WILDLIFE AND COUNTRYSIDE ACT 1981

Dorset Council (A Byway Open to All Traffic, Beaminster at Crabb's Barn Lane) Definitive Map and Statement Modification Order 2020

STATEMENT OF CASE OF THE TRAIL RIDERS FELLOWSHIP

DEFINITIONS AND ABBREVIATIONS

1. The following definitions and abbreviations are adopted:

TRF	Trail Riders Fellowship
Dorset	Dorset Council
DMS	Definitive Map and Statement
WCA 1981	Wildlife and Countryside Act 1981
[DSoC]	A reference to the specified paragraph of Dorset's Statement of Case **[DSoC¶###]** or to a page from an appendix to that **[DSoC/App##/###]**
[DDoc/]	A reference to documents in Dorset's submission for confirmation (as referenced in the **[DSoC]** as **Document Reference ##**).
[TRFDoc/]	Documents appended to this Statement of Case
Order Plan	The Plan annexed to the Order at **[DDoc/2]**
A-B-C-D-E-F-G-H-I	Points marked on a plan prepared by Dorset CC **[DSOC/App4/20]**, which is understood to be an antecedent of the Order Plan (which does not have points A-B marked)

INTRODUCTION

2. On 21 December 2004, [redacted] for Friends of Dorset Rights of Way, made an application to have recorded A-B-C-D-E-F-G-H-I as a BOAT (parts of which were already recorded as bridleways, BR17 and BR35) **[DSoC/App2/2-3]**. Cf. **[DSoC¶4.3]**. The TRF took over conduct of the application.

3. This Statement of Case is accordingly lodged in support of the original application.

4. Dorset rejected the application, deciding that the requirements of para. 1 Schedule 14 had not been met, in that the maps submitted were not at a scale of not less than 1:25,000. Broadly speaking, Dorset reached that view because the maps, although presented at a scale of not less than 1:25,000, had been printed to that scale from a digital product derived from an OS 1:50,000 map. The TRF bought judicial review proceedings challenging that

decision (unsuccessful, at first instance, but succeeding in the Court of Appeal, whose decision was upheld by the Supreme Court).

5. Dorset proceeded then to determine the application, deciding that C-D-E-F-G-H-I (only, and not A-B-C) should be recorded on the DMS as a BOAT. The order has been submitted for confirmation and objections have been made.

THE TRF'S POSITION

6. The TRF:

   6.1. Invites the Inspector to modify the order so as to include the upgrading of A-C as a BOAT.

   6.2. Subject to that, supports the confirmation of the order and adopts the evidence and analysis in support of Dorset.

   6.3. Adopts Dorset's comments as respects the objections to the confirmation of the order. In particular, a point specifically expanded upon below, it is not open to [redacted] an objector who was also an interested party in those proceedings, to seek to attack the conclusion of the Supreme Court in R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406 (judgment **[TRFDoc/4]**; order **[TRFDoc/5]**), upholding the declaration of the Court of Appeal (judgment **[TRFDoc/2]**; order **[TRFDoc/3]**) that the application in the present case complied with para. 1 Schedule 14 WCA 1981.

R (TRAIL RIDERS FELLOWSHIP) V DORSET CC [2015] UKSC 18

7. In the proceedings which the TRF brought to challenge Dorset's refusal to accept the application as having been validly made, the relief which the TRF sought and successfully obtained in the Court Appeal included the following **[TRFDoc/3]**:

   '*5. It is **declared** that the five applications dated 14/7/04 (ref. T338), 25/9/04 (ref. T339), 21/12/04 (ref. T350), 21/12/04 (ref. 353) and 21/12/04 (ref. T354) under section 53(5) Wildlife and Countryside Act 1981 **were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981**.*

*6. The First Defendant **will proceed to determine such applications** in accordance with the provisions of Schedule 14 Wildlife and Countryside Act 1981*.' (emphasis added)

8. The order in the Supreme Court, upholding the decision of the Court of Appeal, included **[TRFDoc/5]**:

'*THE COURT ORDERED THAT*

1) The appeal be dismissed

...

*IT IS **DECLARED** that*

*4) The five applications dated 14 July 2004 (ref. T338), 25 September 2004 (ref T339), 21 December 2004 (ref. 350), 21 December 2004 (ref 353) and 21 December 2004 (ref. T 354) made to the Appellant under section 53(5) of the Wildlife and Countryside Act 1981 **were made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981**.'* (emphasis added)

9. Therefore, Court of Appeal and the Supreme Court unambiguously declared that the applications were compliant with paragraph 1 Schedule 14 WCA 1981, which provides:

1 An application shall be made in the prescribed form and shall be accompanied by—

(a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and

(b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

10. After the Supreme Court decision Dorset and [redacted] sought to suggest that the order should be varied so as to only refer to paragraph 1(a) Schedule 14, on the purported basis that the point taken in resisting the TRF's claim by Dorset (and supported by [redacted] was the point in relation to the scale of the maps. [redacted] was an interested party in the proceedings and took and participated at all stages (first instance, Court of Appeal and Supreme Court).

11. That attempt was misconceived, given the plain terms of the final order of the Court of Appeal and Supreme Court. It was unambiguously rejected by Lord Carnwath, on whose behalf by email to the parties (including to [redacted] on 5 November 2019 **[TRFDoc/6]**, the registrar of the Supreme Court conveyed the following:

'*The court sees no reason to vary the terms of the order which was agreed between the parties and reflected the form of relief sought in the original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para. 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage*.'.

12. Thus Lord Carnwath was making a number of cumulative points which each illustrated that the attempt was misconceived: (1) the terms of the order had been agreed (this also having been the case as respects the Court of Appeal order); (2) the relief reflected that which had been claimed; (3) Dorset (and also [redacted] had not sought to defend the proceedings by impugning the validity of the applications on other grounds, nor reserved their position. In those circumstances, it was too late to take any such point after the conclusion of the proceedings.

13. Nevertheless – and notwithstanding Lord Carnwath's trenchant explanation of the position – [redacted] sought in the context of the confirmation process as respects another of the five applications encompassed by the proceedings (as respects Bridleway 14, Beaminster – T353) to again revisit the validity of the applications, and even to purport to criticise Lord Carnwath's reasoning. This resulted in the TRF's solicitors having to write further on 16 December 2019 **[TRFDoc/7]**, laying down the marker that '*The TRF has incurred costs in responding to* [redacted] *misconceived collateral attack on a decision of the Supreme Court. The TRF regards* [redacted] *submissions as unreasonable conduct.*'. In the context of that application, on an appeal under para. 4 Schedule 14 (following Dorset's determination that the evidence did not meet the threshold for making a modification order to add a BOAT), the Inspector's decision **[TRFDoc/8]** upheld Dorset's decision on the merits but commented as respects attempts to reopen the question of the validity of the applications:

'30. *The declaration [viz. that of the Supreme Court] clearly states that the application is compliant with paragraph 1, which is the matter to be decided in terms of the relevant exemption in the 2006 Act*.'

(going to reinforce that conclusion, by also rejecting the argument on the merits: the application was indeed compliant).

'*Nonetheless, the information provided by the Council indicates that the application was received before the cut-off date and that all of the documents listed in the application form were supplied by the applicant. There may well be additional evidence that is later found to be relevant, but the Council does not consider that the applicant deliberately withheld any evidence.*'.

14. It, therefore, defies comprehension, and must be unreasonable conduct, that [redacted] seeks to advance (**¶¶3, 4 and 12** of his objection **[DDoc/5]**) the very same argument which is not open to him on the plain wording of the orders of the Court of Appeal and Supreme Court, as further confirmed in no uncertain terms by Lord Carnwath and, moreover, in the face of this being spelt out repeatedly in correspondence and, again, in the decision of the Planning Inspectorate on one of the other applications.

MODIFICATION SO AS TO UPGRADE A-C TO BOAT

The power / duty to propose a modification

15. Paragraph 7(3) Schedule 15 WCA 1981 provides '*On considering any representations or objections duly made and the report of [any person appointed to hold an inquiry] or hear representations or objections, the Secretary of State may confirm the order with or without modifications.*'. Paragraph 8 provides for the procedure when an order is confirmed with modifications.

16. If the Inspector is satisfied at the inquiry that a different order should be made to that which is to be confirmed: see Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] 1 WLR 1264 **[TRFDoc/9]** at [23] per Lord Phillips:

''*In my judgment, the scheme of the procedure under Schedule 15 is that* ***if, in the course of the inquiry, facts come to light*** *which persuade the inspector that the definitive map*

should depart from the proposed order ***he should modify it accordingly****, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a test which requires evaluation of the modification to see whether the inspector can truly be said to be confirming the original order would be undesirable in principle and difficult in practice*.' (emphasis added).

Cf. the Planning Inspectorate's Advice Note 20 (14 October 2021) **[TRFDoc/10]**[1].

The modification to upgrade A-C to BOAT

17. The TRF relies on:

17.1. The conclusions of **Dorset's Report** for a meeting of its Regulatory Committee on 21 March 2019 **[TRFDoc/11/Attachment I]** as respects the application, whose conclusion was to recommend a modification order such that all of the application route – viz. all of A-B-C-D-E-F-G-H-I – be shown on the DMS as a BOAT.

17.2. The **TRF's Grounds of Appeal [TRFDoc/11]**[2] against the decision of Dorset to make a modification order such that *only* C-D-E-F-G-H-I (and *not* A-B-C) be shown on the DMS as a BOAT (contrary to recommendation of the Report). The Planning Inspectorate declined to entertain that appeal as not being within para. 4 Schedule 15 WCA 1981 (since an order had been made in respect of the application, albeit only as respects part of the claimed route). That the Planning Inspectorate has declined to entertain this argument by way of appeal, makes it yet more important that this issue is considered and determined at the confirmation stage.

18. The substantive argument as respects section A-C of the route is contained at **¶¶3-7** TRF's Grounds of Appeal **[TRFDoc/11]**. In short, the most compelling interpretation of the evidence is that A-B-C-D-E-F-G-H-I was historically a through-route (a 'cross-road' on Greenwood's map) and given that (i) as such public rights would be expected to be

[1] The TRF does not accept as correct section 9 of that advice which cuts across the scheme of the procedure as described in Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] 1 WLR 1264 and imposes an arbitrary and unprincipled restriction on the general power to modify. But the point does not arise in the present case since the Order Map does show all of A-C.

[2] Although this is reproduced as **[DDoc/4 Appendix 4]** as a single .pdf this is appended in full to this Statement of Case, so as to provide the best reproductions of particularly maps contained therein.

consistent (and not discontinuous) along such a through-route; and (ii) C-D-E-F-G-H-I carries public vehicular rights (as Dorset has concluded), it follows that A-B-C also carries public vehicular rights.

19. The TRF adds the following further points to that argument:

19.1. The status of the whole historical route, that is A-B-C + C-D-E-F-G-H-I, should be considered taking account the character of the application route in the local network, as far back as the map evidence goes. Where some of the network roads have been improved beyond that early character it is easy to assume that it 'has always been like this'.

19.2. The courts have considered the situation as here where there is express status evidence for just part of a longer road. In Commission for New Towns v. J J Gallagher [2003] 2 P & CR 3 **[TRFDoc/12]** at [91] per Neuberger J, "The Inclosure Award of 1824 is concerned with a relatively small part of Beoley Lane, namely the very south-eastern end. However, given that the issue between the parties concerns whether or not Beoley Lane is a carriageway, it seems clear that the highway status of this part of Beoley Lane cannot be any different from the rest of Beoley Lane." (emphasis added)

19.3. In Fortune v.Wiltshire Council [2012] EWCA Civ 334 **[TRFDoc/13]** at [35] per Lord Lewison "Before delving into this fascinating material, there are two fundamental questions that in our judgment Mrs Fortune's case does not adequately deal with … The first question is: if it is accepted that the public used the way as of right, where were they going to? The answer must be either that they were using Rowden Lane as part of a network of highways (i.e. as a thoroughfare) or they were visiting some particular place simply as members of the public …" (emphasis added)

19.4. In Planning Inspectorate Decision Letter FPS/A4710/7/22 723, of 31 March 1999 as reported in Byway and Bridleway 1999/6/48 & 1999/7/53 **[TRFDoc/14]** per Inspector Dr T O Pritchard, when tasked to consider the true status of a through-route that currently 'changes status' part-way. He said it is "... Improbable for part of a continuous route to be part footpath and part carriageway", expressly taking as authority A.G. (At Relation of A H Hastie) v. Godstone RDC (1912) JP 188 **[TRFDoc/15].**

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2. R (Trail Riders Fellowship) v Dorset CC [2013] EWCA Civ 553 [2013] PTSR 987
3. Order of Court of Appeal 20 May 2013
4. R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406
5. Order of Supreme Court 13 April 2015
6. Email from Registrar of the Supreme Court 5 November 2019, conveying Lord Carnwath's response to a proposed application to vary the order of the Supreme Court
7. [redacted] (for the TRF) letter to the Planning Inspectorate 16 December 2019
8. Planning Inspectorate decision 31 July 2020
9. Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] 1 WLR 1264
10. Planning Inspectorate's Advice Note 20
11. TRF's Grounds of Appeal and annexures
    A. Letter of 4 October 2010 from [redacted] who made the application on behalf of the Friends of Dorset Rights of Way on 21 December 2004, appointing the TRF to be his agent in this case.
    B. Order of the Supreme Court dated 13 April 2015
    C. Dorset report plan 18/13.
    D. Notice of refusal of application, letter dated 26 March 2019.
    E. John Cary's Map of Dorsetshire 1787 (dated by others in the same series).
    F. The application made to the surveying authority. This application lists the evidence submitted with the application, and this is appended here (indexed) using item references,a.a.,b.b.,et seq. The application includes the notices associated with the application.

G. A map showing the alleged right(s)of way.

H. Paper: "Byway Claim for Bridleways 17 & 35 Beaminster" as submitted with the application.

I. Report to the Regulatory Committee, 21 March 2019. Officers' analysis of documentary evidence.

J. Regulatory Committee minutes of 21 March 2019. Reasons for refusal of application.

12. Commission for New Towns v. J J Gallagher [2003] 2 P & CR 3
13. Fortune v.Wiltshire Council [2012] EWCA Civ 334
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Appendix 1

R (Trail Riders Fellowship) v Dorset CC [2012] EWHC 2634 (Admin) [2013] PTSR 302

Queen's Bench Division

Regina (Trail Riders' Fellowship and another) *v* Dorset County Council

[2012] EWHC 2634 (Admin)

2012 June 26, 27; Oct 2

Supperstone J

Highway — Right of way — Definitive map — Applications to modify definitive map to upgrade rights of way to byways open to all traffic — Applications accompanied by computer generated enlargements of Ordnance Survey maps drawn to 1:50,000 scale — Local authority rejecting applications as maps not drawn to prescribed scale of no less than 1:25,000 — Whether applications defective — Whether non-compliance de minimis — Wildlife and Countryside Act 1981 (c 69), s 53(5), Sch 14, para 1 — Natural Environment and Rural Communities Act 2006 (c 16), s 67(3)(6) — Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), regs 2, 8

The claimants lodged five applications with the surveying authority, under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981[1], seeking modification orders in respect of the definitive map and statement ("DMS") in relation to five routes over which the claimants maintained that the public enjoyed vehicular rights of way not recorded on the DMS. Accompanying each application was a map of the route in question. Each map had been taken from computer software with digitally encoded mapping "sourced from the Ordnance Survey". Each had originally been drawn to a scale of 1:50,000 and then printed at an enlarged scale of at least 1:25,000. The authority rejected the applications on the basis that the maps had not been drawn to a scale of not less than 1:25,000 as required by the 1981 Act, as applied by section 67(6) of the Natural Environment and Rural Communities Act 2006[2], and the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993[3].

On the claimants' claim for judicial review—

Held, dismissing the claim, that an application to amend the definitive map and statement made pursuant to section 53(5) of and Schedule 14 to the 1981 Act as applied by section 67(6) of the 2006 Act had to be made strictly in accordance with the terms of paragraph 1 of Schedule 14 to the 1981 Act; that, therefore, the accompanying maps had to have been drawn to a scale of not less than 1:25,000, pursuant to the requirement prescribed by regulation 2 of the 1993 Regulations; that the map "showing the way to which the application relates", in the words of paragraph 1 of Schedule 14 of the 1981 Act, had to be originally and properly drawn to that scale, whether by a professional or lay person and whether drawn by computer or hand drawn, with an accuracy and precision relative to that scale to enable the surveying authority to ascertain, as a minimum, the route of the claimed way; that Parliament had prescribed a scale of not less than 1;25,000 in the knowledge that OS maps were used to prepare the DMS and in the reasonable expectation that applicants would accompany their applications with OS maps drawn to the required scale thereby including a sufficient level of physical detail; that the maps submitted by the claimants, drawn to a scale of 1:50,000 and then printed to a scale of not less than 1:25,000, had not been drawn to the prescribed scale so that the application had not

[1] Wildlife and Countryside Act 1981, S 53(5): see post, para 5.
[2] Natural Environment and Rural Communities Act 2006, s 67(6): see post, para 9.
[3] Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, regs 2, 8: see post, para 8.

A been made strictly in accordance with the requirements of the 1981 Act; and that, accordingly, that non-compliance being more than merely de minimis, the authority had been right to refuse the applications (post, paras 22, 27, 31, 33, 34–36, 44, 45).

The following cases are referred to in the judgment:

Maroudas v Secretary of State for the Environment, Food and Rural Affairs [2010] EWCA Civ 280, CA

B *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA

No additional case was cited in argument of referred to in the skeleton arguments.

CLAIM for judicial review

By a claim form the claimants, Trail Riders' Fellowship and [redacted]
C [redacted] sought judicial review of the decision of the defendant surveying authority, Dorset County Council, to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement for the area. The grounds of claim were: (1) that (a) the authority had been wrong to find that the requirements of paragraph 1 of Schedule 14 to the 1981 Act were
D not exactly complied with and (b) the authority's rejection of the applications proceeded on a mistaken understanding of the process by which the maps were produced; and (2) that any non-compliance with paragraph 1 of Schedule 14 to the 1981 Act was de minimis.

The Secretary of State for Environment, Food and Rural Affairs was originally joined as second defendant to the proceedings but, by agreement, later served as the first interested party. [redacted] representing
E the interests of the Green Lanes Protection Group and affected landowners, was served as the second interested party.

The facts are stated in the judgment.

[redacted] (instructed by [redacted] *Basingstoke*) for the claimants.

George Laurence QC (instructed by *Head of Legal and Democratic*
F *Services, Dorset County Council, Dorchester*) for the surveying authority.

[redacted] (instructed by [redacted] *Solicitors*) for the second interested party.

The Secretary of State did not appear and was not represented.

The court took time for consideration.

G

2 October 2012. **SUPPERSTONE J** handed down the following judgment.

Introduction

1 The claimants challenge the decision of the local authority, Dorset County Council, to reject five applications made under section 53(5) of and
H Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement ("the DMS"). The claim concerns five routes over which the claimants maintain the public enjoy vehicular public rights of way (including with mechanically-propelled vehicles) which were not recorded on the DMS.

2 The claimants contend that the effect of the decisions made by the local authority is that public rights of way for mechanically-propelled vehicles have been extinguished.

3 The principal issue in this case is whether for the purposes of paragraph 1 of Schedule 14 to the 1981 Act as applied by section 67(6) of the Natural Environment and Rural Communities Act 2006 a map which accompanies an application made under section 53(5) of the 1981 Act is drawn to the prescribed scale only if it is derived from a map originally so drawn without being enlarged or reduced in any way.

4 [redacted] a member of the Friends of Dorset's Rights of Way ("FoDRoW") submitted the applications. The first claimant is an organisation that took over the conduct of the applications from FoDRoW in October 2010. [redacted] the second claimant, is a member of FoDRoW. The local authority is the surveying authority, as defined in section 66(1) of the 1981 Act, for the area in which the proposed "byway[s] open to all traffic" are located. The Secretary of State for Environment, Food and Rural Affairs, the first interested party, was originally joined to the proceedings as a defendant; subsequently by agreement the Secretary of State was removed as a defendant and joined as an interested party. [redacted] the second interested party, represents the interests of the Green Lanes Protection Group and affected landowners.

The legal framework

5 Section 53 of the 1981 Act imposes a duty on a surveying authority to keep a DMS of the public rights of way in its area under continuous review. So far as material, it provides:

> "(2) As regards every definitive map and statement, the surveying authority shall— (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
>
> "(3) The events referred to in subsection (2) are as follows . . . (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows . . . (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification."
>
> "(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events

falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

6 There are three categories of public highway: footpath, bridleway, and "byway open to all traffic" ("BOAT"). Section 66 of the 1981 Act defines a BOAT as:

"a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used".

7 Schedule 14 to the 1981 Act provides:

"1 *Form of applications*

"An application shall be made in the prescribed form and shall be accompanied by— (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

"2 *Notice of applications*

"(1) Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates."

"(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.

"(4) Every notice or certificate under this paragraph shall be in the prescribed form.

"3 *Determination by authority*

"(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall— (a) investigate the matters stated in the application; and (b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates."

"5 *Interpretation*

"(1) In this Schedule . . . 'prescribed' means prescribed by regulations made by the Secretary of State."

8 The material regulations made by the Secretary of State are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. The 1993 Regulations provide:

"2 *Scale of definitive maps*

"A definitive map shall be on a scale of not less than 1/25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose."

"6 *Provisions supplementary to regulations 4 and 5*

"Regulations 2 and 3 above shall apply to the map contained in a modification or reclassification order as they apply to a definitive map."

"8 *Application for a modification order*

"(1) An application for a modification order shall be in the form set out in Schedule 7 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case.

"(2) Regulation 2 above shall apply to the map which accompanies such an application as it applies to the map contained in a modification or reclassification order."

9 Section 67 of the Natural Environment and Rural Communities Act 2006 provides:

"*Ending of certain existing unrecorded public rights of way*

"(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement— (a) was not shown in a definitive map and statement, or (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway. But this is subject to subsections (2) to (8)."

"(3) Subsection (1) does not apply to an existing public right of way over a way if— (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic, (b) before commencement, the surveying authority has made a determination under paragraph 3 of Schedule 14 to the 1981 Act in respect of such an application, or (c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically-propelled vehicles— (i) was reasonably necessary to enable that person to obtain access to the land, or (ii) would have been reasonably necessary to enable that person to obtain access to a part of that land if he had had an interest in that part only.

"(4) 'The relevant date' means— (a) in relation to England, 20 January 2005 . . ."

"(6) For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act."

10 Section 130(1) of the Highways Act 1980 provides:

"It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it."

The factual background

11 Between 14 July 2004 and 21 December 2004 [redacted] submitted five applications under section 53(5) of the 1981 Act to modify the definitive map to upgrade existing rights of way to BOAT status and/or to cause lengths of path to be shown as BOATs. The applications relate to routes (1) at Bailey Drove (T338); (2) from Doles Hill Plantation East to Chebbard Gate in Cheselbourne/Dewlish (T339); (3) in Tarrant Gunville/Chettle (T350); (4) in Meerhay Lane from Meerhay to Beaminster Down,

A Beaminster (T353); and (5) in Crabbs Barn Lane (T354). Accompanying each application was a map showing the route in question. [redacted] describes at para 6 of his witness statement the method by which the maps were produced. In summary the method was: (1) the maps were generated using software installed on his personal computer. The software is called "Anquet" and the relevant version number was V1. (2) The software was designed for the viewing and printing of digitally encoded maps. B The digitally encoded maps from which the applications maps were generated were purchased by him and were supplied on a CD-ROM. The packaging on the CD-ROM describes the map as "Anquet Maps: the South Coast". The packaging refers to 1:50,000 and states: "mapping sourced from Ordnance Survey". (3) The printing function on the software allows maps to be printed to a range of scales. In relation to the maps in C question, the software allowed maps to be printed to scales ranging from 1:10,000 to 1:1,000,000. He selected a scale that best fitted the claimed route on A4 paper but it was always 1:25,000 or larger. He then printed the maps on a laser printer. (4) The maps, he says, which were produced are "to a scale of at least 1:25,000: that is to say, eg, a measurement of one centimetre on the printed map corresponds to a measurement of 250 metres or less on the ground".

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12 Each of the applications was acknowledged by the local authority by early 2005. There was no intimation that the applications were defective before 2009.

13 The minutes of the meeting of the local authority's Roads and Rights of Way Committee ("the committee") held on 7 October 2010 at which the five applications were considered record, at minute 125.6:

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> "The Head of Legal and Democratic Services referred members to the requirement for an application to be accompanied by a map drawn to a scale of not less than 1:25,000 . . . The Head of Service[s] advised that he did not believe the maps which accompanied the applications to have been drawn to a scale of not less than 1:25,000. Members were referred to letters [dated 19 March 2009 and 10 December 2009] provided by the F Ordnance Survey setting out their comments and in particular to their description of an application map as a facsimile copy of an enlarged image taken from the Ordnance Survey digital raster mapping originally produced at a 1:50,000 scale."

The committee resolved to refuse all five applications. Under the heading "Reasons for Recommendation", the following was recorded:

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> "1. For the transitional provisions in the Natural Environment and Rural Communities Act 2006 to apply so that public rights of way for mechanically propelled vehicles are not extinguished the relevant application must have been made before 20 January 2005 and must have been made in strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act 1981. The applications in question H were accompanied by computer generated enlargements of Ordnance Survey maps and not by maps drawn to a scale of not less than 1:25,000. In each case none of the other exemptions in the 2006 Act are seen to apply and so the applications should be refused."

That decision was notified in writing to the claimants on 2 November 2010.

The parties' submissions

14 [redacted] for the claimants, submits that the local authority was wrong to find that the requirements of paragraph 1 of Schedule 14 to the 1981 Act were not exactly complied with. The maps were drawn to a scale of no less than 1:25,000 and plainly showed the routes in question. The legislative requirements do not address themselves to the way in which such a map is derived, only to the end result. "Drawn to the prescribed scale" must, he submits, refer to the scale of what is produced to the authority: ground 1(a). It is common ground that the applications were accompanied by a map; and that the map was to a scale of no less than 1:25,000 in the sense that measurements on the map corresponded to measurements on the ground by a fixed ratio whereby a measurement of one centimetre on the map corresponds to a measurement of no more than 250 metres on the ground.

15 Further [redacted] submits that the local authority's rejection of the applications proceeded on a mistaken understanding of the process by which the maps were produced: ground 1(b). He so submits by reference to the second claimant's evidence, at para 18.3 of his witness statement dated 30 January 2011:

> "Although a digital map might be said to have a level of accuracy in that the location of particular features will be stored to a particular resolution, it is misleading to talk of it having a scale until it is printed (or viewed). Such a map may be printed or viewed at any particular scale . . ."

In their detailed statement of grounds in support of their application for judicial review the claimants indicated that they wished to call expert evidence on this issue.

16 If paragraph 1 of Schedule 14 to the 1981 Act was not exactly complied with, [redacted] submits that any departure was "de minimis": ground 2. The maps which accompanied the applications enabled the local authority to identify the routes in relation to which the applications were made; and were of a greater practical use than many examples of maps which, on the local authority's analysis, would have complied exactly with the legislative requirements, such as, for example, a hand drawn map or a poorly photocopied 1:25,000 map.

17 Mr George Laurence QC, for the local authority, submits that on the proper construction of paragraph 1 of Schedule 14 to the 1981 Act as applied by section 67(6) of the 2006 Act, a map which accompanies an application made under section 53(5) of the 1981 Act is drawn to not less than the prescribed scale only if it is originally so drawn (i e created or produced) and is thereafter reproduced for use by the applicant when making his application without being enlarged or reduced in any way: ground 1(a).

18 Further Mr Laurence submits the local authority was entitled to rely on the views expressed by the Ordnance Survey ("OS") (on whose maps the applications maps were based). The OS stated in letters dated 19 March 2009 and 10 December 2009 that the application maps were an enlargement of the 1:50,000 map: ground 1(b).

19 Mr Laurence submits that if a map accompanying an application must be a replica, neither enlarged nor reduced, of a map drawn to a scale of

A not less than 1:25,000, it is wrong to treat a map that has been enlarged to 1:25,000 or less from a 1:50,000 map as compliant with the legislation on the basis of de minimis merely because, on the facts of a particular case, it could be said that it was possible to identify the routes in relation to which the application was made: ground 2.

20 [redacted] for the second interested party, supports the local B authority's position. She submits that the claimants' failure to comply with paragraph 1 of Schedule 14 is not a mere "technical" point, as the claimants suggest. The objection is not that 1:25,000 scale maps happen to have been produced in an incorrect way; the objection is that the applications were not accompanied by 1:25,000 scale maps at all: ground 1.

21 Further [redacted] submits paragraph 1 of Schedule 14 requires that the application maps satisfy both of two elements: first, "drawn to the C prescribed scale", and second, "showing the way". The fact that a map to the wrong scale shows the way at that wrong scale is not a good reason, she submits, for saying that the use of the wrong scale is de minimis: ground 2.

Discussion

The first issue: whether there was compliance with paragraph 1 of D *Schedule 14*

22 In *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138 the Court of Appeal considered what is meant by an application made in accordance with paragraph 1 of Schedule 14 to the 1981 Act within the meaning of section 67(6) of the 2006 Act. Dyson LJ said, at para 54:

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> "In my judgment, section 67(6) requires that, for the purposes of section 67(3), the application must be made strictly in accordance with paragraph 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things (de minimis non curat lex). Indeed this principle is explicitly recognised in regulation 8(1) of the 1993 Regulations. Thus minor departures from F paragraph 1 will not invalidate an application."

23 [redacted] submits that there was strict compliance with paragraph 1 of Schedule 14. He observes that the sole basis on which the applications were rejected was that the map which accompanied each application was derived by enlarging a 1:50,000 map. As to the legislative requirement for a map to a scale of no less than 1:25,000 he makes five points. First, it does not G specify that an OS map must be used (or indeed any other specific type of map). Second, it does not require that any particular physical details be given on the map other than the way itself; third, it places no relevance on the fact that, for example, OS 1:25,000 maps as compared to OS 1:50,000 maps by convention show differing land details. Fourth, it contemplates that a hand drawn map would suffice. Fifth, it does not specify particular accuracy with which a map must be drawn.

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24 Further, [redacted] emphasises the purpose of an application map. It is provided at the first stage in an application for a modification order. As such it triggers an obligation on the surveying authority to investigate. The surveying authority may then propose a modification order, as a result of which the surveying authority may themselves produce a map. A change

to the definitive map is not effective until confirmed, which may involve a public inquiry at which any person may give evidence as to the route to be adopted. The Secretary of State may then decide not to confirm the order proposed, but rather propose a different order.

25 In a letter dated 5 June 2009 the Department for Environment, Food and Rural Affairs ("DEFRA") expressed the view that an application that was accompanied by a map that has been photographically enlarged could be a "qualifying" application under the de minimis principle. [redacted] prays in aid two of the reasons given for that conclusion in support of his primary submission that there was strict compliance with paragraph 1 of Schedule 14. First, as DEFRA noted, the legislation does not specify that maps accompanying an application are to be either professionally prepared or based on OS maps, so there is nothing to say that an applicant cannot "draw" his own map. Provided it was to a scale of 1:25,000 or greater, such a map would meet the terms of the legislation, but could be considerably less clear, accurate and detailed than a map photographically enlarged from a 1:50,000 OS map. Second, one can take this argument one stage further and envisage a scenario where an applicant takes a 1:50,000 OS map, photographically enlarges it to 1:25,000, then traces that map onto blank paper and submits that tracing as the map accompanying the application, now "drawn" as prescribed to 1:25,000. Such a map would meet the terms of the legislation, even if (almost inevitably) the traced version would have lost something of the detail contained in the original OS map from which it was taken and therefore be less fit for purpose than a map photographically enlarged from a 1:50,000 OS map.

26 [redacted] suggests this illustrates the absurdity of the local authority's argument that the focus of the legislative requirements is on the map as it is originally drawn and not, as the claimants contend, on the map as it is produced to the authority. Similarly [redacted] submits, if the map was hand drawn to the prescribed scale, it being mechanically produced from another map, it would, he suggests, be impossible to tell the scale from which it had been drawn, yet on the local authority's construction if the hand drawn map was an enlargement or reduction of the source map it would not be compliant. However as Mr Laurence points out, if a map is drawn by an applicant from, say, two sources, so long as what is produced can properly be described as a map to the prescribed scale, it would comply with the statutory requirements. That being so, Mr Laurence suggests that [redacted] example does not advance his submission. The onus is on the applicant to show that the map is produced to the prescribed scale.

27 In my judgment, none of these matters alter the fact that the applications were accompanied by a map that was not a 1:25,000 scale map. A document headed "Ordnance Survey response to questions posed by the parties to the case" dated 18 May 2012, provides what has been treated by the parties as expert evidence from the OS. In Part I of the document, under the heading "The implications for computer based technologies on the presentation of mapping", the OS state, inter alia:

> "26. For the purposes of this response, Ordnance Survey will focus solely on raster data since the digital versions of the mapping from Ordnance Survey at issue are both held by Ordnance Survey and published in raster data format. (i) Since the raster image is in lay terms a

'digital picture' of the map, it follows that once the raster has been created only the content of the source graphic map is contained within the data . . .

"27. It also follows that, disregarding the capabilities of a computer screen or printer/plotter to reproduce a specific map image, the process of outputting from raster data, a map published at one scale, at a larger or smaller output scale simply magnifies or reduces the image of the map, but cannot change the content or appearance of the source map/source data . . ."

28 Questions asked by the local authority and answers provided by OS include the following:

"(1) Question 1 (first part) where: 1.1 digital raster mapping is originally produced by the OS at 1:50,000 scale ('the original product'); 1.2 an image is taken from the original product and enlarged to a 1:25,000 scale; and 1.3 a facsimile copy of that enlarged image is produced in printed form ('the map') is the map properly to be regarded as being at a scale of 1:50,000 or 1:25,000?"

"Answer: As described in the question the map would be properly to be regarded as a 1:50,000 scale Ordnance Survey map enlarged to a 1:25,000 scale."

"(2) Question 1 (second part): If not properly regarded as being at a scale of 1:25,000 is the map regarded as equivalent to a map produced at 1:25,000 by the Ordnance Survey?"

"Answer: It is not regarded by Ordnance Survey as equivalent to a map published by Ordnance Survey at 1:25,000 scale, since it does not conform to the standard cartographic style and content used by Ordnance Survey for national series maps and data products published at the 1:25,000 scale."

"Question 6: What are the differences between an OS 1:25,000 map and an enlarged (by the method described by the claimants) 1:50,000 product?"

"Answer: The differences are those already expressed as the differences between the specifications of the two data sets published by Ordnance Survey. They are most apparent visually in the different levels of content simplification, generalisation, symbology and conventions of depiction of the two map series.

"These include, for example, the inclusion of land enclosure boundaries, separate depiction of a greater number of individual buildings, and depiction of various roads widths for certain categories of road within the 1:25,000 scale OS Explorer Map and 1:25,000 scale colour raster, compared with the more heavily simplified and generalised content of the 1:50,000 scale OS Landranger Map and 1:50,000 scale colour raster which has standardised road width depictions, far fewer individual buildings identified and minimal land enclosure boundary information."

29 Mr Laurence and [redacted] submit that the construction of paragraph 1 of Schedule 14 that they put forward is consistent with the approach taken in the decisions of two inspectors; first, that of [redacted] of 10 June 2009 in a case involving Buckinghamshire County Council.

The application map used in that case was a photocopy extract from an OS 1:50,000 scale map which had been enlarged photographically to a scale of 1:25,000. The inspector decided that the map remained a map which had been drawn at a scale of 1:50,000, so the exemption in section 67(3) of the 2006 Act did not apply.

30 Second, there was the decision of Mr Millman made on 15 July 2011 in a case involving Dorset County Council which included applications made by the claimants as part of a series of applications, which include the five applications in issue in the present proceedings, all of which use the same kind of application maps. Exactly the same questions arose in that case as in the instant case. Mr Millman had regard to DEFRA's advice letter of 3 July 2009 and concluded that as there was no distinction between the appearance of a map produced by photographic enlargement and one printed from digital data, there can be no sensible justification for not applying DEFRA's advice on photographic enlargement to a computer generated image of an identical product. He found that the applications in question did not comply with the requirements of Schedule 14 to the 1981 Act for the purposes of section 67(6) of the 2006 Act.

31 In my judgment it does not follow from the fact that Parliament has not specified that an OS map must be used that by selecting as the minimum prescribed scale 1:25,000 Parliament did not have in mind that at that scale it is possible to provide detail which at lesser scales it becomes increasingly difficult to provide. I accept Mr Laurence's submission that Parliament required a map at a prescribed scale of 1:25,000 to accompany applications under section 53(5) of the 1981 Act in the knowledge that OS maps were used to prepare the DMS itself and in the reasonable expectation many persons who apply to modify the DMS would choose to accompany their applications with OS maps. Accordingly it made sense to prescribe that the accompanying map should be at a scale enabling applicants who choose to use an OS map to include a level of detail sufficient to ensure that in most cases physical features, bounding tracks on the ground or separating one parcel of land from another would appear on an OS map drawn to that scale.

32 Such a construction of paragraph 1 of Schedule 14 is supported by reference to paragraph 3 of Schedule 14. A compliant application engages the provisions of paragraph 3 of Schedule 14 by requiring the authority to investigate the matters stated in it. The requirement for the accompanying map to be at the prescribed scale avoids or diminishes the burden on the authority of inspecting the land and then trying to construe the application in order to ascertain, for example, whether the way claimed passes between hedges, not shown on the map, or on which side of a boundary feature, also not shown on the map, the way claimed runs. Where, for example, a question arises as to which side of a field boundary the route applied for runs, the 1:25,000 map will inform the surveying authority that there is, physically, such a boundary whereas that information may often not appear on a 1:50,000 map at all: see the witness statement of [redacted] on behalf of the local authority, at paras 8–14.

33 Mr Laurence submits that the words in paragraph 1 of Schedule 14 "showing the way to which the application relates" appear to have been carefully chosen. Whilst, even on a map at a scale of 1:25,000 it would not be reasonable to expect the applicant to depict exactly the area of land said

A to qualify say as a BOAT, a document needs to contain a certain amount of appropriate detail before it can qualify as a map at all. The requirement for it to be drawn to scale of not less that 1:25,000 suggests, Mr Laurence contends, that a good deal of accurate detail must be included in order that the document put forward may qualify as a "map" as required by paragraph 1 (as opposed to being a mere, even if accurate, sketch map). Moreover, where, as in the present case, an OS map is used the position of
B the way claimed can be shown with greater accuracy if a 1:25,000 map as opposed to a 1:50,000 map is used owing to the inclusion on the former of important physical features which are not shown on the latter. For example, OS 1:50,000 mapping convention is to show roads of generalised standard widths rather than at their true scale width, unlike OS 1:25,000 mapping for certain categories of roads. So an OS 1:50,000 would not be able to show
C the route of the claimed way by reference to the alignment of such a road to the same degree of accuracy and precision as the OS 1:25,000 version.

34 I accept [redacted] submission that in order to "show the way" a qualifying map needs to show sufficient physical features to enable the surveying authority to ascertain, at least, the route of the claimed way, within the constraints of the prescribed scale. Separately from the need to
D show the claimed way though, [redacted] submits, the overarching requirement that the application map be a map to a scale of not less than 1:25,000 imports the requirement that the map be properly drawn to that scale, whether by a professional or lay person and whether drawn by computer or hand drawn, with an accuracy and precision relative to that scale.

35 The claim at ground 1(b) is refuted by the OS evidence. It was the
E claimants' understanding that the scale of the OS raster data used by the claimants was in effect flexible in their hands within the scope of the Anquet product and that the "nominal" scale on the product (1:50,000) in fact meant nothing in terms of "true" scale. The claimants understood that the raster data had no inherent scale but allowed a selection of scales and that they had duly selected, printed and supplied to the local authority
F application maps at the scale of 1:25,000. However it is clear from the OS evidence that is not correct: see paras 27 and 28 above.

Conclusion on first issue

36 In my judgment there was no strict compliance with the requirements of paragraph 1 of Schedule 14 to the 1981 Act. The maps
G which accompanied the applications were not drawn to a scale of no less than 1:25,000: ground 1(a). I reject the claimants' submission that the local authority's analysis of the facts was premised upon a fundamental misunderstanding of the process of reproducing a map by digital means. It is clear from the evidence from OS that the misunderstanding was that of the claimants, not the local authority: ground 1(b).

H *The second issue: the application of the de minimis principle*

37 In the *Winchester College* case [2009] 1 WLR 138 the Court of Appeal accepted, at para 54, that "minor departures from paragraph 1 will not invalidate an application". Indeed, as Dyson LJ observed, this principle is explicitly recognised in regulation 8(1) of the 1993 Regulations. Examples

of departures from the requirements of paragraph 1 of Schedule 14 which may fall within the de minimis rule appear from the later decision of the Court of Appeal in *Maroudas v Secretary of State for Environment, Food and Rural Affairs* [2010] EWCA Civ 280. In that case Dyson LJ accepted that the lack of a date and signature in an application form can in principle be cured by a dated and signed letter sent shortly after the submission of the form, where the omissions are pointed out and the council is asked to treat the application as bearing the date of the letter and the signature of the author of the letter: paras 27 and 36. Similarly, if the application form contains a minor error in the description of the route or its width or length, and the applicant discovers the error shortly after he has submitted the application and writes to the authority correcting it, the application would be contained in the original application form as corrected. Such an amended application would be in accordance with paragraph 1 of Schedule 14: para 28.

38 In *Maroudas's* case Dyson LJ did not find it necessary to define the limits of permissible departures from the strict requirements of paragraph 1 of Schedule 14: para 30. In particular he did not find it necessary to decide whether paragraph 1 of Schedule 14 requires that the map, which should accompany the prescribed form, must be sent at the same time as the form: para 30. In that case the application form was not signed or dated and it was not accompanied by a map showing the route to which it related. The court held that the departures from the requirements of paragraph 1 of Schedule 14 were substantial and were not such as could be saved by the de minimis principle, even when the application was considered together with the subsequent exchange of correspondence.

39 [redacted] submits that there can be no suggestion but that the maps which accompanied the applications enabled the local authority to identify the routes in relation to which the applications were made; and even if there were any uncertainty about the application routes, any such uncertainty could be very easily rectified. Further, he submits, the maps which accompanied the applications were of, at least, as great a practical use as maps which exactly complied with the legislative requirement, on the local authority's analysis; indeed, he submits, they were of greater practical use than many examples of maps which would on the local authority's analysis exactly comply with the legislative requirements, such as a hand drawn map or a poorly photocopied 1:25,000 map.

40 In the circumstances [redacted] submits that the only departure from the requirements of paragraph 1 of Schedule 14 was de minimis.

41 I do not accept that the maps which accompanied the applications were of equal practical use as the maps which should have been submitted. Mr Laurence and [redacted] in their oral submissions showed by reference to the maps in evidence before the court why this is not so: see for example [redacted] first witness statement dated 25 February 2011, at paras 6 and 7, in relation to a similar application by the claimants (T323); [redacted] third witness statement dated 24 April 2012, at paras 13–17, in relation to application T338; and maps (exhibited to [redacted] fourth witness statement dated 19 June 2012) using OS 1:25,000 scale mapping, to show OS 1:25,000 scale versions of the application maps, for comparison with the application maps in applications T339, T350, T353 and T354. It is plain that there are material differences between the presentation of the

A claimed ways on the application maps and their presentation on a 1:25,000 scale map.

42 Further I reject [redacted] submission that any departure from the strict requirements of paragraph 1 of Schedule 14 was of less consequence than a number of illustrations of the scope of the de minimis rule as illustrated in the *Winchester College* case [2009] 1 WLR 138 and *Maroudas's* case [2010] EWCA Civ 280. The de minimis principle, as B [redacted] submits, is not such as to excuse a failure to use application maps to the prescribed scale. It is clear from the evidence that a map to a scale of 1:50,000 is very different from a map to a scale of 1:25,000, in particular, in terms of the detail relevant to the routes of the claimed ways and their impact relative to surrounding features. It cannot follow from the fact that the maps which accompanied the applications enabled the local C authority to identify the routes in relation to which the applications were made that the departure from the requirements of paragraph 1 of Schedule 14 was de minimis. I accept Mr Laurence's submission that for the doctrine of de minimis to apply in these circumstances would mean that each application accompanied by a non-compliant enlarged map would have to be scrutinised on a case-by-case basis, leading to expense and uncertainty.

43 It is not suggested by the claimants that it was impossible for them to D submit applications with maps drawn to the prescribed scale: see the *Winchester College* case [2009] 1 WLR 138, para 50. This is not a case like *Maroudas's* case [2010] EWCA Civ 280 where the issue was whether the applicant had remedied the defects in question soon enough for them to be treated as de minimis. The claimants do not recognise that there was no qualifying map. Mr Laurence accepts that, if a compliant map is E photocopied, without being enlarged or reduced in size, and it became distorted in the copy, the de minimis principle should apply; however that is not this case.

Conclusion on second issue

44 In my judgment the de minimis principle has no application in the F present case.

Conclusion

45 For the reasons I have given this claim fails.

Claim dismissed.

G BENJAMIN WEAVER ESQ, Barrister

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Appendix 2

R (Trail Riders Fellowship) v Dorset CC [2013] EWCA Civ 553 [2013] PTSR 987

A

Court of Appeal

Regina (Trail Riders' Fellowship and another) *v* Dorset County Council

[2013] EWCA Civ 553

B

2013 April 23; May 20

Maurice Kay, Black, Rafferty LJJ

Highway — Right of way — Definitive map — Applications to modify definitive map and statement — Applications accompanied by computer generated enlargements of Ordnance Survey maps drawn to 1:50,000 scale — Local authority rejecting applications on ground maps not drawn to prescribed scale of not less than 1:25,000 — Whether maps required to be originally drawn to scale of not less than 1:25,000 — Whether applications defective — Wildlife and Countryside Act 1981 (c 69), s 53(5), Sch 14, para 1 — Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), regs 2, 8

C

The claimants lodged five applications with the surveying authority, under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981[1], seeking

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modification orders in respect of the authority's definitive map and statement in relation to five routes over which the claimants maintained that the public enjoyed vehicular rights of way not recorded on the map and statement. Accompanying each application was a map of the route in question. Each map had been taken from computer software with digitally encoded mapping "sourced from the Ordnance Survey". Each had originally been drawn to a scale of 1:50,000 and then printed at an enlarged scale of at least 1:25,000. The authority rejected the applications on the

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basis that the maps did not comply with the requirement in paragraph 1(a) of Schedule 14 to the 1981 Act that they be drawn to the prescribed scale, which, by regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993[2], was a scale of not less than 1:25,000. The judge dismissed the claim, holding that in order to comply with the requirements of the 1981 Act and the 1993 Regulations a map had to have been originally drawn to a scale of not less than 1:25,000.

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On appeal by the claimants—

Held, allowing the appeal, that paragraph 1(a) of Schedule 14 to the Wildlife and Countryside Act 1981, read together with regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, required that an application to which Schedule 14 applied be accompanied by something that (i) was identifiable as a map, (ii) was drawn to a scale of not less than 1:25,000 and (iii) showed the way or ways to which the application related; that the statutory

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scheme did not specify that the map had to be one produced by the Ordnance Survey or any other commercial or public authority, nor was the scheme prescriptive as to the features which had to be shown on the map beyond the way or ways to which the application related; that "drawn" in paragraph 1(a) of Schedule 14 to the 1981 Act was not to be construed as being confined to "originally drawn" but should be given a

[1] Wildlife and Countryside Act 1981, s 53(5): "Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be

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requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

Sch 14, para 1: see post, para 3.

[2] Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, reg 2: see post, para 4.

Reg 8(2): see post, para 5.

meaning which embraced later techniques for the production of maps, synonomous with "produced" or "reproduced"; that, therefore, the requirement that a map be "drawn" to a scale of not less than 1:25,000 did not mean that the map had to have been originally drawn to that scale and what was important was the scale on the document which accompanied the application; that it followed that a map produced to a scale of 1:25,000, even if it was digitally derived from an original map with a scale of 1:50,000, satisfied the requirements of paragraph 1(a) of Schedule 14 to the 1981 Act provided that it was indeed a map and it showed the way or ways to which the application related; and that, accordingly, the maps submitted by the claimants had been drawn to the correct scale and the application had been made in accordance with the requirements of the 1981 Act (post, paras 10–12, 14, 16, 17, 18).

Grant v Southwestern and County Properties Ltd [1975] Ch 185 and *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] 2 AC 687, HL(E) considered.

Decision of Supperstone J [2012] EWHC 2634 (Admin); [2013] PTSR 302 reversed.

The following cases are referred to in the judgment of Maurice Kay LJ:

Grant v Southwestern and County Properties Ltd [1975] Ch 185; [1974] 3 WLR 221; [1974] 2 All ER 465

R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening) [2003] UKHL 13; [2003] 2 AC 687; [2002] 2 WLR 692; [2003] 2 All ER 113, HL(E)

Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800; [1981] 2 WLR 279; [1981] 1 All ER 545, CA and HL(E)

The following additional cases were cited in argument:

Maroudas v Secretary of State for the Environment, Food and Rural Affairs [2010] EWCA Civ 280; [2010] NPC 37, CA

Perkins v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 658 (Admin); [2009] NPC 54

R (Wardens and Fellows of Winchester College) v Hampshire County Council [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA

R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490; 89 LGR 398, CA

The following additional cases, although not cited, were referred to in the skeleton arguments:

Attorney General ex rel Yorkshire Derwent Trust Ltd v Brotherton [1992] 1 AC 425; [1991] 3 WLR 1126; [1992] 1 All ER 230; 90 LGR 15, HL(E)

Kotegaonkar v Secretary of State for the Environment, Food and Rural Affairs [2012] EWHC 1976 (Admin); [2012] ACD 311

Morgan v Hertfordshire County Council (1965) 63 LGR 456, CA

R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385; [1999] LGR 651, HL(E)

R v Secretary of State for the Environment, Ex p Hood [1975] QB 891; [1975] 3 WLR 172; [1975] 3 All ER 243; 73 LGR 426, CA

APPEAL from Supperstone J

By a claim form the claimants, Trail Riders' Fellowship and [redacted] sought judicial review of the decision of the defendant surveying authority, Dorset County Council, to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement for the area.

A The grounds of claim were: (1) that (a) the authority had been wrong to find that the requirements of paragraph 1 of Schedule 14 to the 1981 Act were not exactly complied with and (b) the authority's rejection of the applications proceeded on a mistaken understanding of the process by which the maps were produced; and (2) that any non-compliance with paragraph 1 of Schedule 14 to the 1981 Act was de minimis. The Secretary of State for
B Environment, Food and Rural Affairs was originally joined as second defendant to the proceedings but, by agreement, later served as the first interested party. [redacted] representing the interests of the Green Lanes Protection Group and affected landowners, was served as the second interested party.

By order dated 2 October 2012 [2012] EWHC 2634 (Admin); [2013] PTSR 302 Supperstone J sitting in the Administrative Court of the Queen's
C Bench Division dismissed the claim, holding that the maps submitted had not been drawn to the prescribed scale so that the applications had not been made strictly in accordance with the requirements of the 1981 Act; and that since the non-compliance was more than merely de minimis the authority had been right to refuse the applications.

By an appellant's notice dated 22 October 2012 and pursuant to the
D permission of the Court of Appeal (Sullivan LJ) granted on 28 November 2012 the claimants appealed. The sole ground of appeal was that the judge had erred in holding that the five applications did not comply in terms with the requirements of paragraph 1 of Schedule 14 to the 1981 Act: in particular his conclusion that a map produced to a scale of 1:25,000 which was digitally derived from an original map with a scale of 1:50,000 did not satisfy the relevant requirements of paragraph 1(a) of Schedule 14 to
E the 1981 Act. The judge should have found that a map of 1:25,000 scale so produced to accompany each of the five applications was a "map" drawn to the prescribed scale which showed the ways to which the applications related for the purposes of the 1981 Act. The Court of Appeal at the substantive hearing refused permission to appeal on a second ground, rejected by Sullivan LJ, relying on the de minimis principle.

F The facts are stated in the judgment of Maurice Kay LJ.

[redacted] (instructed by [redacted]) for the claimants.

George Laurence QC (instructed by *Head of Legal and Democratic Services, Dorset County Council, Dorchester*) for the surveying authority.

[redacted] as the second interested party, in person.

G The Secretary of State did not appear and was not represented.

The court took time for consideration.

20 May 2013. The following judgments were handed down.

H **MAURICE KAY LJ**

1 Access to the countryside often gives rise to controversy. The existence and extent of public rights of way is now regulated by Part III of the Wildlife and Countryside Act 1981. It requires surveying authorities to maintain definitive maps and statements. They are given "conclusive evidence" status by section 56, which distinguishes between footpaths,

bridleways and byways open to all traffic ("BOATs"). Definitive maps and statements have to be kept under continuous review: see section 53(2)(b). Any person can apply to the relevant authority for an order which makes such modifications as appear to the authority to be requisite in consequence of certain events: see section 53(5). The prescribed events include the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map or statement subsists or that a highway shown in the map or statement as a highway of a particular description ought to be there shown as a highway of a different description: see section 53(3). An application pursuant to section 53(5) must comply with requirements set out in Schedule 14. This case is concerned with those requirements.

2 In 2004, [redacted] a member of Friends of Dorset's Rights of Way, submitted five applications to Dorset County Council ("the local authority"), the appropriate surveying authority, seeking modification orders in relation to the definitive map and statement. His aim was to achieve the upgrading of existing rights of way from footpath or bridleway to BOAT status and/or to achieve BOAT status for other lengths of path. In due course, [redacted] and his organisation were replaced as claimants by [redacted] and the Trail Riders' Fellowship (of which [redacted] is a member). The objects of the Trail Riders' Fellowship are "to preserve the full status of vehicular green lanes and the rights of motorcyclists and others to use them as a legitimate part of the access network of the countryside". Essentially, the Trail Riders' Fellowship seeks to establish that rights of way presently depicted in definitive maps and statements as footpaths or bridleways should be reclassified as BOATs, thereby enabling members of the fellowship and others to ride their motorcycles on them. As [redacted] says in his witness statement, this is an emotive issue. However, at this stage we are not concerned with the merits of the applications or the quality of the general evidence said to support them. Our sole concern is with whether, as a matter of form, the applications complied with the statutory requirements.

The statutory requirements

3 Paragraph 1 of Schedule 14 to the 1981 Act provides:

> "An application shall be made in the prescribed form and shall be accompanied by— (a) a map drawn to the prescribed scale showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application."

The present dispute is concerned with the maps submitted with the applications.

4 "Prescribed" in paragraph 1(a) means prescribed by regulations made by the Secretary of State: see paragraph 5(1). The relevant regulations are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993. Regulation 2 provides:

> "A definitive map shall be on a scale of not less than 1:25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose."

A 5 By regulation 8(2), regulation 2 "shall apply to the map which accompanies such an application as it applies to the map contained in a modification or reclassification order".

6 Thus, in simple terms, when a person applies for a modification order, he must show the right of way for which he contends on a map drawn to a scale of not less than 1:25,000.

B *The issue*

7 In his witness statement, [redacted] describes how he produced the maps which he submitted with the applications:

> "The maps were generated using software installed on my personal computer. The software is called 'Anquet' and the relevant version
C number was V1 . . . The software was designed for the viewing and printing of digitally encoded maps. The digitally encoded maps from which the application maps were generated were purchased by me and were supplied on a CD-ROM. The packaging on the CD-ROM describes the map as 'Anquet Maps: the South Coast'. The packaging refers to 1:50,000 scale and states: 'mapping sourced from Ordnance Survey' . . . The printing function on the software allows maps to be printed to a
D range of scales. In relation to the maps in question, the software allowed maps to be printed to scales ranging from 1:10,000 to 1:1,000,000. I selected a scale that best fitted the claimed route on A4 paper but it was always 1:25,000 or larger. I then printed the maps on a laser printer . . . The maps which were produced are, indeed, to a scale of at least 1:25,000, that is to say . . . a measurement of one centimetre on the
E printed map corresponds to a measurement of 250 metres or less on the ground."

8 For more than four years after the applications were filed with the local authority, no point was taken as to compliance with the statutory requirements relating to the maps—or, indeed, as to anything else. However, in October 2010 all five applications were rejected by the local
F authority. Its reasoning was: "The applications in question were accompanied by computer generated enlargements of Ordnance Survey maps and not by maps drawn to a scale of not less than 1:25,000 . . ." In other words, it did not accept that a map which had originally been drawn to a scale of 1:50,000 but then enlarged by a computer program to a scale of 1:25,000 was a map which was, at the time of its submission, drawn to a
G scale of not less than 1:25,000.

9 The Trail Riders' Fellowship and [redacted] challenged this decision by way of an application for judicial review but on 2 October 2012 the application was dismissed by Supperstone J [2013] PTSR 302. In essence, he agreed with the local authority's interpretation, found non-compliance by the claimants and rejected an alternative ground of challenge based on the de minimis principle.

H *Discussion*

10 It is important to keep in mind what paragraph 1(a) of Schedule 14 to the 1981 Act does and does not require. It is beyond dispute that it requires (1) something that is identifiable as "a map", which (2) is drawn to a

scale of not less than 1:25,000, and which (3) shows the way or ways to which the application relates. Although the first of these requirements necessitates a map, it does not necessitate an Ordnance Survey map. It could have done. Such a statutory requirement is not unknown. For example, section 1(3) of the Commons Act 1899 refers to a "plan", adding that "for this purpose an ordnance survey map shall, if possible, be used". More recently, regulation 5 of the Petroleum (Production) (Landward Areas) Regulations 1995 (SI 1995/1436), which is concerned with licence applications, requires an application to be accompanied by two "copies of an Ordnance Survey map on a scale of 1:25,000, or such other map or chart as the Secretary of State may allow". The scheme with which we are concerned is not so specific. Nor is it prescriptive as to features which must be shown on the map, apart from the requirement that it "shows the way or ways to which the application relates". It is well known that an original Ordnance Survey map with a scale of 1:25,000 depicts more physical features than an original Ordnance Survey map of the same site with a scale of 1:50,000. However, as paragraph 1(a) of Schedule 14 to the 1981 Act permits the use of a map which is not produced by Ordnance Survey (or any other commercial or public authority), it cannot be said to embrace a requirement that a map accompanying an application must include the same features as are depicted on an original 1:25,000 Ordnance Survey map. It may include more or fewer such features.

11 In my judgment, this tends to militate against the submissions made on behalf of the local authority. To the extent that it is contended that "drawn to a scale of not less than 1:25,000" means "*originally* drawn to that scale, with the range of features normally depicted on an original Ordnance Survey map drawn to that scale", the submission seeks to read more into the text than its language permits. I can find nothing to support such a prescriptive requirement as to content as opposed to scale. The only prescriptive requirement as to content is that the map "shows the way or ways to which the application relates". This is a flexible requirement. Sometimes more detail will be necessary, sometimes less, depending on the way in question and its location.

12 The next question is whether the words "drawn to" a scale of not less than 1:25,000 mean that the map in question must have been originally drawn to that scale rather than enlarged or reproduced to it. I can see no good reason for giving the requirement such a narrow construction. What is important is the scale on the document which accompanies the application. "Drawn" need not imply a reference to the original creation. It is more sensibly construed as being synonymous with "produced" or "reproduced". The local authority does not suggest that only an original document will suffice. It accepts that a photocopy or a tracing of a 1:25,000 Ordnance Survey map would meet the requirement. However, no doubt mindful of the logic of his position, Mr George Laurence QC submits that an original 1:25,000 map which had been digitally enlarged to produce a 1:12,500 map would not meet the requirement. [redacted] whilst also seeking to uphold the construction of Supperstone J, dissociates himself from this aspect of Mr Laurence's analysis. I consider that he is right to do so. It points to the pedantry of the local authority's position.

13 I reach this conclusion on the basis of conventional interpretation. However, it is fortified by an approach which takes account of technological

change. At the time when the 1981 Act was enacted, Parliament would not have had in mind the kind of readily available technology which was used in this case. In *R (Quintavalle) v Human Fertilisation and Embryology Authority (Secretary of State for Health intervening)* [2003] 2 AC 687, para 9 Lord Bingham of Cornhill said:

> "There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking . . . The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language . . . [a] revealing example is found in *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, where Walton J had to decide whether a tape recording falls within the expression 'document' in the Rules of the Supreme Court. Pointing out, at p 190, that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that a tape recording was a document."

Lord Bingham also referred to the speech of Lord Wilberforce in *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800, 822 where he said:

> "when a new state of affairs, or a fresh set of facts bearing on policy comes into existence, the courts have to consider whether they fall within . . . the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made."

Although the present case may be said to be more concerned with procedure than with policy, the same approach is appropriate, as it was in *Grant v Southwestern and County Properties Ltd* [1975] Ch 185.

14 All this leads me to the view that, whilst I am confident that "drawn" was never intended to be construed as being confined to "originally drawn", it should also now be given a meaning which embraces later techniques for the production of maps. For practical purposes, when a computer is used to translate stored data into a printed map, it can properly be said that the computer and the printer are, on human command, "drawing" the map which emerges to the scale which has been selected. I find no difficulty in this approach in circumstances in which the requirements do not prescribe that the submitted map depicts the features which are depicted on an original 1:25,000 Ordnance Survey map.

15 It is submitted on behalf of the local authority that its task as the surveying authority is made more difficult by the use of a map which, although it is to the scale of 1:25,000, does not depict all the features of an original 1:25,000 Ordnance Survey map. For example, the absence of such features may make it difficult to determine which of two adjacent landowners is the "owner or occupier of the land to which the application relates" for the purpose of service of a notice pursuant to paragraph 2(1) of Schedule 14 to the 1981 Act. However, service of such a notice is an obligation of the applicant, not of the surveying authority and, in any event, there is a statutory alternative where it is not practicable, after reasonable inquiry, to ascertain the owner: see paragraph 2(2) of Schedule 14.

Ultimately, it is for the surveying authority "to investigate the matters stated in the application": see paragraph 3(1)(a) of Schedule 14. In some cases such an investigation may be easier with the benefit of a map such as an original 1:25,000 Ordnance Survey map but that does not mean that the map accompanying the application must take that form in the absence of clear prescription. Parliament has laid down minimum requirements for the map which accompanies an application. The application triggers an investigation. If the investigation results in a modification of the definitive map, the surveying authority may conclude that the definitive map can only convey the requisite clarity if, say, an original Ordnance Survey 1:25,000 map is used in order to include features not shown on an original 1:50,000 map. It does not follow that such a map was required at the application stage. Moreover, at the modification stage, if further clarity is considered necessary, it may be secured by the statement which may be part of "the definitive map and statement": see section 53(1) of the 1981 Act. I am unconvinced by the protestations of inconvenience advanced on behalf of the local authority. They do not assist with the task of interpretation.

Conclusion

16 For all these reasons, I conclude that a map which is produced to a scale of 1:25,000, even if it is digitally derived from an original map with a scale of 1:50,000, satisfies the requirements of paragraph 1(a) of Schedule 14 to the 1981 Act provided that it is indeed "a map" and that it shows the way or ways to which the application relates. I would therefore allow this appeal. There was originally a second ground of appeal which sought to rely on the de minimis principle. Sullivan LJ refused permission to appeal on that ground, observing that if the appeal were to succeed on the first ground, the second ground is unnecessary; and that, if the appeal were to fail on the first ground, the non-compliance with paragraph 1(a) "could not sensibly be described as de minimis". I respectfully agree. Although we have received submissions in support of a renewed application for permission in relation to the second ground, I would refuse permission.

BLACK LJ

17 I agree.

RAFFERTY LJ

18 I also agree.

Appeal allowed.

ALISON SYLVESTER, Barrister

Appendix 3

Order of Court of Appeal 20 May 2013

COURT 72
Appeal No.

C1/2012/2689

MONDAY 20TH MAY 2013

IN THE COURT OF APPEAL

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

CO8992011

BEFORE LORD JUSTICE MAURICE KAY Vice President of the Court of Appeal, Civil Division
LADY JUSTICE BLACK
AND LADY JUSTICE RAFFERTY

IN THE MATTER OF a claim for judicial review

B E T W E E N

THE QUEEN (ON THE APPLICATION OF)

(1)TRIAL RIDERS FELLOWSHIP

FIRST CLAIMANT/ APPELLANT

- and -

(2)[redacted]

SECOND CLAIMANT

- and -

DORSET COUNTY COUNCIL

DEFENDANT/ FIRST RESPONDENT

- and -

(1)SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS

FIRST INTERESTED PARTY/ SECOND RESPONDENT

- and -

(2)[redacted]

SECOND INTERESTED PARTY/ THIRD RESPONDENT

UPON HEARING Counsel for the Appellant, Leading Counsel for the First Respondent and the Third Respondent in person

1. The appeal is allowed on Ground 1.

2. Permission to appeal is refused on Ground 2.

3. The order of Mr Justice Supperstone dated 2 October 2012 is set aside.

4. The claim for judicial review of the decision of the First Defendant dated 2 November 2010 is allowed.

5. It is declared that the five applications dated 14/7/04 (ref. T338), 25/9/04 (ref. T339), 21/12/04 (ref. T350), 21/12/04 (ref. 353) and 21/12/04 (ref. T354) under section 53(5) Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981.

6. The First Defendant will proceed to determine such applications in accordance with the provisions of Schedule 14 Wildlife and Countryside Act 1981.

7. The First Defendant will by 4.00pm 3 June 2013:

   7.1. Repay to the Appellant the sum of £5,000 paid to the First Respondent pursuant to the order of Mr Justice Supperstone dated 2 October 2012;

   7.2. Pay the Appellant's costs of the proceedings in the Court below in the agreed sum of £15,000 (inclusive of VAT).

   7.3. Pay the Appellant's costs of the appeal in the agreed sum of £10,000 (inclusive of VAT).

8. Permission to appeal to the Supreme Court is refused.

By the Court

MONDAY 20TH MAY 2013

IN THE COURT OF APPEAL

ON APPEAL FROM
THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF a claim for judicial review

ORDER

Copies to:

Queen's Bench Division - Administrative Court
Room C317
Royal Courts of Justice
The Strand
London WC2A 2LL

[redacted]
Ref: MSS/TRF/DORSET

Dorset County Council
Legal And Democratic Services
Dx 8716
Dorchester
Ref: SLM/E105678

Thomas Eggar Llp
Dx 85715
Crawley
Ref: PPG/JRP/2312/45106495

Treasury Solicitors
Dx 123242
Kingsway 6
Ref: JULIETTE DEVANI

* This order was drawn by Mr J Hebden (Associate) to whom all enquiries regarding this order should be made. When communicating with the Court please address correspondence to Mr J Hebden, Civil Appeals Office, Room E307, Royal Courts of Justice, Strand, London WC2A 2LL (DX 44450 Strand) and quote the Court of Appeal reference number. The Associate's telephone number is 020 7947 7896

Appendix 4

R (Trail Riders Fellowship) v Dorset CC [2015] UKSC 18 [2015] 1 WLR 1406

Supreme Court

*Regina (Trail Riders Fellowship and another) *v* Dorset County Council [redacted] intervening)

[2015] UKSC 18

2015 Jan 15; March 18

Lord Neuberger of Abbotsbury PSC, Lord Clarke of Stone-cum-Ebony, Lord Sumption, Lord Carnwath, Lord Toulson JJSC

Highway — Right of way — Definitive map — Applications to modify definitive map and statement — Applications accompanied by computer generated enlargements of Ordnance Survey maps drawn to 1:50,000 scale — Local authority rejecting applications on ground maps not drawn to prescribed scale of not less than 1:25,000 — Whether maps required to be originally drawn to scale of not less than 1:25,000 — Whether applications defective — Wildlife and Countryside Act 1981 (c 69), s 53(5), Sch 14, para 1 — Natural Environment and Rural Communities Act 2006 (c 16), s 67 — Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12), regs 2, 8

The claimants lodged five applications with the surveying authority, under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981[1], seeking modification orders in respect of the authority's definitive map and statement in relation to five routes over which the claimants maintained that the public enjoyed vehicular rights of way not recorded on the map and statement. Accompanying each application was a map of the route in question. Each map had been produced using a computer software program and digitally encoded maps which derived originally from Ordnance Survey maps drawn to a scale of 1:50,000 but were printed at an enlarged scale of at least 1:25,000. The authority rejected the applications on the basis that the maps did not comply with the requirement in paragraph 1(a) of Schedule 14 to the 1981 Act that they be drawn to the prescribed scale, which, by regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993[2], was a scale of not less than 1:25,000, with the result that any rights of way which were the subject of the applications were extinguished by section 67 of the Natural Environment and Rural Communities Act 2006[3]. The claimants sought judicial review of the authority's decision. The judge dismissed the claim, holding that in order to comply with the requirements of the 1981 Act and the 1993 Regulations a map had to have been originally drawn to a scale of not less than 1:25,000. The Court of Appeal allowed the claimants' appeal.

On the authority's appeal—

Held, dismissing the appeal (Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC dissenting), that paragraph 1(a) of Schedule 14 to the Wildlife and Countryside Act 1981, read together with regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, required that an application for a modification order had to be accompanied by a map (i) which was drawn to the prescribed scale, (ii) which was not less than 1:25,000 and (iii) which showed the way or ways to which the application related; that the statutory scheme did not specify that the map should had to be produced by the Ordnance Survey or

[1] Wildlife and Countryside Act 1981, s 53: see post, para 5.
Sch 14, para 1(a): see post, para 7.
[2] Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993, regs 2, 8: see post, para 8.
[3] Natural Environment and Rural Communities Act 2006, s 67: see post, para 9.

any other commercial or public authority, nor was it prescriptive as to the features which had to be shown on the map, apart from the requirement that it had to show the way or ways to which the application related; that "drawn" in paragraph 1(a) of Schedule 14 to the 1981 Act was not to be construed as being confined to "originally drawn" but should be given a meaning which embraced later techniques for the production of maps, synonomous with "produced" or "reproduced"; that, therefore, a map which accompanied an application for a modification order which was presented at a scale of no less than 1:25,000 satisfied the requirement of being "drawn to the prescribed scale" in circumstances where it had been digitally derived from an original map with a scale of 1:50,000, provided that it identified the way or ways to which the application related; and that, accordingly, the applications submitted to the authority were not defective (post, paras 18–33, 35–40, 51, 80–81).

Per Lord Clarke of Stone-cum-Ebony JSC. The surveying authority is under a public law obligation to prepare and maintain the definitive map and statement in proper form, which duty must itself imply that it should be at least professionally prepared to a quality and detail equivalent to the Ordnance Survey map. Given the availability of the Ordnance Survey map, it would be irrational for the authority not to use it (post, para 28).

Per Lord Neuberger of Abbotsbury PSC, Lord Sumption and Lord Toulson JJSC. The purpose of section 67 of the Natural Environment and Rural Communities Act 2006 is to extinguish certain rights of way if they are not registered, subject to certain exemptions including those ways subject to applications under section 53(5) of the 1981 Act which are made in accordance with paragraph 1 of Schedule 14. It is consistent with the purpose of section 67 of the 2006 Act to exclude from that class of exemption cases where the application is defective (post, paras 41, 49, 98–102, 108–109).

Decision of the Court of Appeal [2013] EWCA Civ 553; [2013] PTSR 987; [2014] 3 All ER 429 affirmed.

The following cases are referred to in the judgments:

Grant v Southwestern and County Properties Ltd [1975] Ch 185; [1974] 3 WLR 221; [1974] 2 All ER 465

Inverclyde District Council v Lord Advocate (1981) 43 P & CR 375, HL(Sc)

Maroudas v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 628 (Admin); [2010] EWCA Civ 280; [2010] NPC 37, CA

Oxfordshire County Council v Oxford City Council [2005] EWCA Civ 175; [2006] Ch 43; [2005] 3 WLR 1043; [2005] 3 All ER 961; [2005] LGR 664, CA; [2006] UKHL 25; [2006] 2 AC 674; [2006] 2 WLR 1235; [2006] 4 All ER 817; [2006] LGR 713, HL(E)

R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354; [1999] 3 All ER 231, CA

R v Soneji [2005] UKHL 49; [2006] 1 AC 340; [2005] 3 WLR 303; [2005] 4 All ER 321, HL(E)

R (Quintavalle) v Secretary of State for Health [2003] UKHL 13; [2003] 2 AC 687; [2003] 2 WLR 692; [2003] 2 All ER 113, HL(E)

R (Warden and Fellows of Winchester College) v Hampshire County Council [2007] EWHC 2786 (Admin); [2008] RTR 173; [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA

The following additional cases were cited in argument:

Perkins v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 658 (Admin); [2009] NPC 54

R (Norfolk County Council) v Secretary of State for the Environment, Food and Rural Affairs [2005] EWHC 119 (Admin); [2006] 1 WLR 1103; [2005] 4 All ER 994

APPEAL from the Court of Appeal

The claimants, Trail Riders Fellowship and [redacted] sought judicial review of the decision of the defendant surveying authority, Dorset County Council, on 7 October 2010 to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 for modification orders to the definitive map and statement. On 2 October 2012 Supperstone J sitting in the Administrative Court of the Queen's Bench Division dismissed the claim, holding that the maps submitted had not been drawn to the prescribed scale so that the applications had not been made strictly in accordance with the requirements of the 1981 Act; and that since the non-compliance was more than merely de minimis the authority had been right to refuse the applications: [2013] PTSR 302. On 20 May 2013, the Court of Appeal (Maurice Kay, Black and Rafferty LJJ) allowed the authority's appeal: [2013] PTSR 987. On 24 March 2014 the Supreme Court (Lord Neuberger of Abbotsbury PSC, Lord Carnwath and Lord Toulson JJSC) allowed an application by the claimants for permission to appeal. The issues for the Supreme Court, as set out in the parties' statement of agreed facts and issues, were: (1) did a map which accompanied an application and was presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where it had been digitally derived from an original map with a scale of 1:50,000; and (2), if it did not, did the exception in section 67(3)(a) of the Natural Environment and Rural Communities Act 2006 ipso facto not apply or should an application nevertheless be treated as having been made in accordance with paragraph 1 of Schedule 14 for the purposes of saving rights for mechanically propelled vehicles?

On 24 November 2014 the Supreme Court granted permission for [redacted] who represented the interests of the Green Lanes Protection Group and affected landowners, to intervene on the appeal.

The facts are stated in the judgment of Lord Clarke of Stone-cum-Ebony JSC.

George Laurence QC and *Kira King* (instructed by *Head of Legal and Democratic Services, Dorset County Council, Dorchester*) for the surveying authority.

Adrian Pay and *Thomas Fletcher* (instructed by *Brain Chase Coles, Basingstoke*) for the claimants.

[redacted] (assisted by his solicitors, *Thomas Eggar LLP, Crawley*) in person.

The court took time for consideration.

18 March 2015. The following judgments were handed down.

LORD CLARKE OF STONE-CUM-EBONY JSC

Introduction

1 This is an appeal by Dorset County Council ("the council") from an order of the Court of Appeal (Maurice Kay LJ, who is Vice President of the Court of Appeal, Black LJ and Rafferty LJ) [2013] PTSR 987, allowing an appeal by the claimants from an order of Supperstone J ("the judge") dated

A 2 October 2012, [2013] PTSR 302, in which he dismissed an application for judicial review of the decision of the council to reject five applications made under section 53(5) of and Schedule 14 to the Wildlife and Countryside Act 1981 ("the 1981 Act") for modification orders to a definitive map and statement ("the DMS"). The claim concerns five routes over which the claimants say that the public enjoy vehicular public rights of way (including with mechanically propelled vehicles) which were not recorded on the DMS.

B **2** The first issue in this appeal and the principal issue which was considered in the courts below is whether, for the purposes of paragraph 1 of Schedule 14 to the 1981 Act as applied by section 67(6) of the Natural Environment and Rural Communities Act 2006 ("the 2006 Act"), a map which accompanies an application made under section 53(5) of the 1981 Act is drawn to the prescribed scale only if it is derived from a map originally so C drawn without being enlarged or reduced in any way. The judge answered that question in the affirmative but the Court of Appeal disagreed. In this appeal the council seeks the restoration of the order made by the judge. If the appeal succeeds, any public rights of way which were the subject of the five applications will have been extinguished.

3 In this judgment I will focus on the first issue. There is a second issue, which only arises if the council's appeal on the first issue fails.

D **4** The applications were submitted by [redacted] who is a member of the Friends of Dorset's Rights of Way ("FDRW"). The first claimant, the Trail Riders Fellowship ("TRF"), took over the conduct of the applications from FDRW in October 2010. The second claimant, [redacted] is a member of FDRW. The council is the surveying authority, as defined in section 66(1) of the 1981 Act, for the area in which the proposed byways open to all traffic ("BOATs") are located. The intervener, E [redacted] represents the interests of the Green Lanes Protection Group and affected landowners. He supports the council's appeal.

The legal framework

5 Section 53 of the 1981 Act imposes a duty on a surveying authority to keep a DMS of the public rights of way in its area under continuous review. F So far as material, it provides:

> "(2) As regards every definitive map and statement, the surveying authority shall— (a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in G subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
>
> "(3) The events referred to in subsection (2) are as follows . . . (c) the H discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows— (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be

there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification."

"(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

6 As the judge put it [2013] PTSR 302, para 6, there are three categories of public highway: footpaths, bridleways, and "byways open to all traffic", known as "BOATs". Section 66 of the 1981 Act defines a BOAT as "a highway over which the public have a right of way for vehicular and all other kinds of traffic, but which is used by the public mainly for the purpose for which footpaths and bridleways are so used . . ."

7 Schedule 14 to the 1981 Act provides:

"1 *Form of applications*

"An application shall be made in the prescribed form and shall be accompanied by— (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates; and (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application.

"2 *Notice of applications*

"(1) Subject to sub-paragraph (2), the applicant shall serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates."

"(3) When the requirements of this paragraph have been complied with, the applicant shall certify that fact to the authority.

"(4) Every notice or certificate under this paragraph shall be in the prescribed form.

"3 *Determination by authority*

"(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall— (a) investigate the matters stated in the application; and (b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates."

"5 *Interpretation*

"(1) In this Schedule . . . 'prescribed' means prescribed by regulations made by the Secretary of State."

8 The material regulations made by the Secretary of State are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 ("the 1993 Regulations"), which provide:

"2 *Scale of definitive maps*

"A definitive map shall be on a scale of not less than 1:25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose."

A "*6 Provisions supplementary to regulations 4 and 5*

"Regulations 2 and 3 above shall apply to the map contained in a modification or reclassification order as they apply to a definitive map."

"8 *Applications for a modification order*

"(1) An application for a modification order shall be in the form set out in Schedule 7 to these Regulations or in a form substantially to the like
B effect, with such insertions or omissions as are necessary in any particular case.

"(2) Regulation 2 above shall apply to the map which accompanies such an application as it applies to the map contained in a modification or reclassification order."

The form of application set out in Schedule 7 provides for an applicant who
C wishes, for example, to add a BOAT to the DMS (whether by upgrading an existing path shown on the map or by adding the path for the first time) to identify the points from and to which the proposed BOAT runs and its route as "shown on the map accompanying this application."

9 Section 67 of the 2006 Act provides:

"*Ending of certain existing unrecorded public rights of way*

D "(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement— (a) was not shown in a definitive map and statement, or (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway. But this is subject to subsections (2) to (8)."

E "(3) Subsection (1) does not apply to an existing public right of way over a way if— (a) before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic, (b) before commencement, the surveying authority has made a determination under paragraph 3 of
F Schedule 14 to the 1981 Act in respect of such an application, or (c) before commencement, a person with an interest in land has made such an application and, immediately before commencement, use of the way for mechanically propelled vehicles— (i) was reasonably necessary to enable that person to obtain access to the land, or (ii) would have been reasonably necessary to enable that person to obtain access to a part of
G that land if he had had an interest in that part only.

"(4) 'The relevant date' means— (a) in relation to England, 20 January 2005 . . ."

"(6) For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act."

H 10 Section 130(1) of the Highways Act 1980 provides:

"It is the duty of the highway authority to assert and protect the rights of the public to the use and enjoyment of any highway for which they are the highway authority, including any roadside waste which forms part of it."

The factual background and procedural history

11 I take this from the agreed statement of facts and issues. The following five applications were made for modification orders under section 53(5). (1) On 14 July 2004 application T338 was made in relation to a route at Bailey Drove so as to add a BOAT to part of the route and to upgrade to a BOAT on two other parts of the route, which were at the time shown as a footpath (to the west) and a bridleway (to the east). (2) On 25 September 2004 application T339 was made in relation to a route consisting of two bridleways in the parishes of Cheselbourne and Dewlish so as to upgrade them to a BOAT. (3) On 21 December 2004 application T350 was made in relation to a route in the parish of Tarrant Gunville so as to add a BOAT to part of the route and to upgrade to a BOAT the remainder of the route, which at the time was shown as a bridleway. (4) On 21 December 2004 application T353 was made in relation to a route in the parish of Beaminster so as to upgrade the same to a BOAT from its existing status of bridleway. (5) On 21 December 2004 application T354 was made in relation to a route in the parish of Beaminster so as to add a BOAT to two parts of the route not shown on the DMS and to upgrade to a BOAT two further parts of the route which were at the time shown as bridleways.

12 Accompanying each application was a map showing the route in question. Each map was produced using a computer software program entitled "Anquet" and digitally encoded maps which derived originally from Ordnance Survey ("OS") maps drawn to a scale of 1:50,000. The computer software program allowed the user to view or print out maps (or parts of maps) at a range of scales. In my opinion importantly, it was expressly agreed in the statement of facts and issues that the enlarged maps that were reproduced as a result of this process were all to a presented scale of 1:25,000 or larger, in that measurements on the maps corresponded to measurements on the ground by a fixed ratio whereby a measurement of 1 cm on the map corresponds to a measurement of no more than 250 metres on the ground.

13 It does not appear that the council had any difficulty in considering the applications. Each of the applications was acknowledged by the council by early 2005 and there was no indication that the applications were defective until 2009. The council made no complaint about them until 7 October 2010, when, perhaps because of objections to the applications on their merits, a meeting took place of the council's roads and rights of way committee, at which it rejected all five applications on the ground that they "were accompanied by computer generated enlargements of OS maps and not by maps drawn to a scale of not less than 1:25,000".

14 As the judge noted at [2013] PTSR 302, para 13, under the heading "Reasons for recommendation", the following was recorded:

> "For the transitional provisions in the Natural Environment and Rural Communities Act 2006 to apply so that public rights of way for mechanically propelled vehicles are not extinguished the relevant application must have been made before 20 January 2005 and must have been made in strict compliance with the requirements of Schedule 14 to the Wildlife and Countryside Act 1981. The applications in question were accompanied by computer generated enlargements of Ordnance Survey maps and not by maps drawn to a scale of not less than 1:25,000.

A In each case none of the other exemptions in the 2006 Act are seen to apply and so the applications should be refused."

On 2 November 2010 the council communicated its decision to [redacted] who appealed to the Secretary of State on behalf of TRF but the Secretary of State declined to determine the appeals on the basis of lack of jurisdiction.

15 Subsequently permission to apply for judicial review seeking an B order that the decision of 2 November 2010 be quashed and that a mandatory order be granted requiring the council to determine the applications was refused on paper. It was however subsequently granted after an oral hearing before Edwards-Stuart J and the matter was fully argued before the judge, who on 2 October 2012 upheld the decision of the council on the ground that the application map did not comply with the legal C requirements. He further held that the extent of the non-compliance was not within the scope of the principle de minimis non curat lex.

16 The judge refused permission to appeal to the Court of Appeal. Permission to appeal was granted on the first point by Sullivan LJ. It was however refused on the de minimis point. As stated above, on 20 May 2013, the Court of Appeal reversed the decision of the judge on the first point: [2013] PTSR 987. However, it refused an application for permission D on the de minimis point on the basis that, if the appeal had failed on the first point, the non-compliance "could not sensibly be described as de minimis": para 16.

17 The parties agreed that the first question can be stated as follows. Does a map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where E it has been "digitally derived from an original map with a scale of 1:50,000"?

Discussion

18 This is a short point. It involves the construction of two particular provisions which I have already set out. By paragraph 1 of Schedule 14 to F the 1981 Act, an application for a modification order must be made in the prescribed form and must be accompanied by a map (a) which was drawn to the prescribed scale, (b) which was not less than 1:25,000 and (c) which showed the way or ways to which the application related. No distinction has been drawn between the five applications. They either all complied or they all failed to comply. It is accepted that they were each accompanied by G a map. It is I think also accepted that each of the maps showed the way or ways to which the application related.

19 The question is therefore whether each of the maps was drawn to a scale of not less than 1:25,000. On the face of it that question must be answered in the affirmative. Paragraph 1 of Schedule 14 provides that the map must be drawn "to the prescribed scale" and by paragraph 5 "prescribed" means prescribed by the 1993 Regulations. By regulation 2 of H those Regulations, "A definitive map shall be on a scale of not less than 1:25,000" and, by regulation 8(2), regulation 2 applies to a map accompanying an application. As I read these provisions, no distinction is drawn between a map "drawn to the prescribed scale" and a map "on a scale of not less than 1:25,000".

20 On the ordinary and natural meaning of these provisions it appears to me that the map referred to in paragraph 1(a) of Schedule 14 is the map which must be drawn to the prescribed scale. Only one map accompanied each application. In each case it was the map produced as described above to a presented scale of 1:25,000 or larger, in that measurements on the map corresponded to measurements on the ground by a fixed ratio whereby a measurement of 1 cm on the map corresponds to a measurement of no more than 250 metres on the ground. Thus each such map was on a scale of not less than 1:25,000 and, in my opinion, satisfied regulations 2 and 8(2) of the 1993 Regulations. In my opinion each such map also satisfied paragraph 1(a) of Schedule 14 on the basis that it was drawn to the same scale.

21 To my mind only one map had to comply with the prescribed criteria in each case, namely the map which accompanied the application, which I will call "the application map". So far as I am aware no one has suggested that the application map was not a map, whether it was a photocopy of an existing map or an enlargement of a map. In any event I would hold that it was plainly a map. It was submitted on behalf of the council (and held by the judge) that, where the application map was based on or drawn from a previous map, the relevant map was any map from which the application map was derived but not the application map itself. I agree with the Court of Appeal that there is nothing in the language of the relevant statutes or regulations to warrant that conclusion.

22 It was also suggested that it must have been intended that the application map should be on a scale of 1:25,000 and exhibit all the detail which would appear on an OS map on that scale. Of course, it could have been so provided by statute or regulation. As Maurice Kay LJ said at [2013] PTSR 987, para 10, such a statutory requirement is not unknown. For example, section 1(3) of the Commons Act 1899 refers to a "plan", adding that "for this purpose an Ordnance Survey map shall, if possible, be used". More recently, regulation 5 of the Petroleum (Production) (Landward Areas) Regulations 1995 (SI 1995/1436), which is concerned with licence applications, requires an application to be accompanied by two "copies of an Ordnance Survey map on a scale of 1:25,000, or such other map or chart as the Secretary of State may allow". I agree with Maurice Kay LJ that the scheme with which we are concerned is not so specific. Nor is it prescriptive as to features which must be shown on the map, apart from the requirement that it must show the way or ways to which the application relates.

23 It is of course well known (and not in dispute) that an original OS map with a scale of 1:25,000 depicts more physical features than an original OS map of the same site with a scale of 1:50,000. However, again I agree with Maurice Kay LJ that, since paragraph 1(a) permits the use of a map which is not produced by OS (or any other commercial or public authority), it cannot be said to embrace a requirement that the application map must include the same features as are depicted on an original 1:25,000 OS map.

24 I appreciate that, as was submitted on behalf of the council, an original OS map on a scale of 1:25,000 might well have been of more use to the council than an enlarged OS map originally produced on a scale of 1:50,000 but, for good or ill, no such requirement was included in the statutory provisions. In any event this point seems to me to have been afforded more emphasis that it merits. The council of course already has OS maps on a scale of 1:25,000 which it can readily consult. If it has any

A questions which are relevant to the application it can raise them with the applicant.

25 Further, it is in my opinion important to note that the council expressly concedes in its case that in theory an applicant might himself be able to create an accurate map at 1:25,000 which nevertheless contained only such detail as an OS 1:50,000 map. Moreover, he could do so in manuscript without reference to an OS map. It seems to me to follow from
B that concession that, if used as the application map, such a map would comply with the statutory provisions. Moreover, that is so even if one would ordinarily expect the application map to be based on the OS 1:25,000 map. Some reliance was placed on the fact that an OS map would ordinarily be used but I do not see how that helps to construe a provision which defines what must be done but makes no reference to such a requirement.

C **26** There is in evidence an extract of an online road map (not an OS map) on a scale of 1:25,000 which shows the claimed route in red but on which a number of public roads and village names are missing. It satisfies the relevant provisions notwithstanding the fact that it contains very little information. It satisfies the provisions because it is a map, because it is on a scale of not less than 1:25,000 and, critically, because it shows the way to which the application related. So far as I am aware, the council accepts that
D an application map so drawn is not objectionable but, even if it did not, I would so hold. If that is correct, it follows that it is not necessary that the application map should be an OS map. As Maurice Kay LJ said in his para 10, the application map may include more or fewer features than those marked on an OS map of the same scale. And, as he said at para 11, the provision that the map must show "the way or ways to which the application
E relates" is a flexible requirement; sometimes more details will be required and sometimes fewer, depending on the way in question and its location. This is I think a critical point because it shows that the application map may have very few of the details on the ordinary OS map on a scale of 1:25,000.

27 I recognise that, without any requirement of scale, an applicant (who is quite likely to be a lay person) might produce a map of any scale. It is therefore understandable that the application map should have to be on a
F reasonable scale for the purposes of clarity. Any scale chosen would have an element of arbitrariness but, since the DMS has to be on a scale of not less than 1:25,000, it was no doubt thought to make practical sense for the application map to be on the same scale. It does not follow that it should have all the same features as the OS map.

28 Some reliance is placed on the fact that the prescribed scale applies in the same terms to the application map as it does to the DMS (regulations 2
G and 6) and that, whatever might be reasonable for an applicant, it would be odd if the DMS itself could be prepared on something other than an OS base. In my opinion, that argument ignores the different contexts in which the rule applies. The authority is under a public law obligation to prepare and maintain the DMS in proper form, which duty must itself imply that it should be at least professionally prepared to a quality and detail equivalent
H to the OS map. Given the availability of the OS map, it would be irrational for the authority not to use it. The same does not apply to a lay applicant, who has no public law duty, and whose sole function is to put the relevant material before the authority for investigation by them. Indeed the draftsman may deliberately have adopted a form of definition which is sufficiently flexible for both contexts.

29 It is not, so far as I am aware, part of the council's case that the application map was not "drawn" within the meaning of paragraph 1(a) of Schedule 14. However, there have been some suggestions to this effect, notably by [redacted] which Maurice Kay LJ considered at [2013] PTSR 987, paras 12–14. He considered in para 12 whether the words "drawn to" a scale of not less than 1:25,000 mean that the application map in question must have been originally drawn to that scale rather than enlarged or reproduced to it. He said that he could see no good reason for giving the requirement such a narrow construction. What was important was the scale of the application map. The word "drawn" did not need to imply a reference to the original creation but was more sensibly construed as being synonymous with produced or reproduced. He said at para 13 that he reached that conclusion on the basis of conventional interpretation but that he was fortified by an approach which takes account of technological change. He referred to *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, para 9, where Lord Bingham of Cornhill said that courts had frequently had to grapple with the question whether a modern invention or activity falls within old statutory language, and approved the decision of Walton J in *Grant v Southwestern and County Properties Ltd* [1975] Ch 185, where he held that a tape recording fell within the expression "document" in the Rules of the Supreme Court.

30 Maurice Kay LJ concluded, at para 14:

> "All this leads me to the view that, whilst I am confident that 'drawn' was never intended to be construed as being confined to 'originally drawn', it should also now be given a meaning which embraces later techniques for the production of maps. For practical purposes, when a computer is used to translate stored data into a printed map, it can properly be said that the computer and the printer are, on human command, 'drawing' the map which emerges to the scale which has been selected. I find no difficulty in this approach in circumstances in which the requirements do not prescribe that the submitted map depicts the features which are depicted on an original 1:25,000 OS map."

I agree.

31 Finally, some reliance was placed on evidence provided by OS at the request of the council. They were asked this question:

> "Where:
> "1.1 digital raster mapping is originally produced by the OS at 1:50,000 scale ('the original product');
> "1.2 an image is taken from the original product and enlarged to a 1:25,000 scale; and
> "1.3 a facsimile copy of that enlarged image is produced in printed form ('the map');
> "is the map properly to be regarded as being at a scale of 1:50,000 or 1:25,000?"

The answer was as follows: "As described in the question the map would be properly to be regarded as a 1:50,000 scale OS map enlarged to 1:25,000." It was submitted on behalf of the council that the scale of the maps as presented by the claimants was indeed (larger than) 1:25,000, but this was only because they had all been enlarged from their original scale. It was submitted that the answer to the issue posed in para 2 above, namely

whether an application map is drawn to the prescribed scale only if it is derived from a map originally so drawn without being enlarged or reduced in any way, is "no".

32 In my opinion the true answer to that question was "yes". The map is a reference to the application map. It was conceded that the scale of the map as presented was larger than 1:25,000. Since, as I see it, the question is what was the scale of the map as presented, i e the application map, it follows that the map complied with the statutory requirements. For the reasons given above, the fact that it was taken from a map on a smaller scale is irrelevant.

33 For all these reasons I would dismiss the appeal on the first issue. The question posed in para 17 above was this. Does a map which accompanies an application and is presented at a scale of no less than 1:25,000 satisfy the requirement in paragraph 1(a) of Schedule 14 of being "drawn to the prescribed scale" in circumstances where it has been "digitally derived from an original map with a scale of 1:50,000"? I would answer the question yes, provided that the application map identifies the way or ways to which the application relates.

The second issue

34 Since Lord Carnwath and Lord Toulson JJSC answer the first question in the same way, it follows that the appeal will be dismissed and the second question will not arise. I am sympathetic to Lord Carnwath JSC's general approach to the construction of provisions like section 67(3) of the 2006 Act and I am doubtful whether Parliament can have intended such a narrow approach as was approved by the Court of Appeal in *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37 to which he refers at para 65. However, I am conscious that we heard no submissions on the correctness of the *Maroudas* case and I see the force of the conclusions expressed by the other members of the court. In these circumstances, since it is not necessary to do so, I prefer to express no view on the second question unless and until it arises on the facts of a particular case.

LORD TOULSON JSC

35 On the question whether the applications submitted by [redacted] to the council satisfied the statutory requirements, I agree with Lord Clarke of Stone-cum-Ebony JSC and the Court of Appeal.

36 Paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981 required applications for the modification of a definitive map and statement to be in the "prescribed form" and accompanied by (a) "a map *drawn to* the prescribed scale and showing the way or ways to which the application relates" (emphasis added), and (b) any documentary evidence on which the applicant wished to rely. "Prescribed" means prescribed by the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 ("the Regulations").

37 Regulation 8(1) required each application to be in the form set out in Schedule 7 to the Regulations or in a form substantially to the like effect; and regulation 8(2) provided that regulation 2 should apply to the map which accompanied the application in the same way as it applied to the map

contained in a modification order. Regulation 2 provided that a definitive map "shall *be on* a scale of not less than 1:25,000" (emphasis added).

38 I do not construe the words "*drawn to* the prescribed scale" as meaning more than "*be on* a scale of not less than 1:25,000". More particularly, I do not see the word "drawn" as mandating a particular method of production. I agree with Maurice Kay LJ that linguistically "drawn" may sensibly be regarded as synonymous with "produced". But the construction of a statute is not simply a matter of grammar, and the question arises whether in the particular context the expression "drawn to the prescribed scale" should be given a narrower interpretation in order to serve its statutory purpose. While I respect the arguments of Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC, I am not persuaded by them. I regard the OS as a red herring. It does not feature in the Regulations. I do not see a proper basis for the admission of the evidence given by the OS, and I do not consider it legitimate to use the OS as a tool in construing the Regulations.

39 As Maurice Kay LJ pointed out, the application for a modification order triggers an investigation. It is the start of a process. The natural purpose of the requirement placed on the applicant is to enable the council properly to understand and investigate the claim. For that purpose one would expect a plan on a 1:25,000 scale as presented to be sufficient, and this case provides an illustration. (On receipt of the applications in 2005, an officer prepared maps in the usual way for the roads and rights of way committee, but the applications had not been considered by the committee when *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138 was decided.) The reason for requiring a plan showing the way or ways to which the application related is self-evident. As to the purpose underlying the prescription of a scale of 1:25,000, rather than simply requiring "a map", I respectfully consider that para 27 of Lord Clarke JSC's judgment offers a sufficient and credible explanation.

40 For those reasons, which I am conscious are no more than a summary of the reasons given by Lord Clarke JSC and Maurice Kay LJ, I agree with their conclusion.

41 The issue regarding the effect of section 67(6) of the Natural Environment and Rural Communities Act 2006 therefore does not arise for decision, but it has been fully argued and I have come ultimately to agree with Lord Neuberger PSC and Lord Sumption JSC.

42 The context of the 2006 Act was that off road use of motorised vehicles had become a subject of considerable controversy in rural areas. The 2006 Act was the culmination of a lengthy process involving considerable public consultation and pre-legislative parliamentary scrutiny, in the course of which a large number of applications were made for modifying definitive maps to re-classify former RUPPs (roads used as public paths) as BOATs (byways open to all traffic). The publication in January 2005 of the Bill which became the 2006 Act coincided with the publication of a lengthy joint report by the Department for the Environment, Food and Rural Affairs and the Countryside Agency of a research project on the use of motor vehicles on BOATs.

43 The purpose of the relevant part of the 2006 Act was to extinguish any unrecorded public rights of way for motor vehicles (by section 67) and to place restrictions on the creation of any fresh rights (by section 66).

A **44** Section 67 is subject to certain exceptions, the relevant one being under subsection (3)(a). This exception applies to an existing right of way if

> "before the relevant date, an application was made under section 53(5) of the Wildlife and Countryside Act 1981 for an order making modifications to the definitive map and statement so as to show the way as a byway open to all traffic . . ."

B **45** The relevant date was 20 January 2005: subsection (4)(a). The obvious purpose of setting this date was to exclude applications made during the legislative process in an attempt to avoid the guillotine.

46 Section 53(5) of the 1981 Act included the words that "the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection."

C **47** I have referred in para 36 to the requirement under paragraph 1 of Schedule 14 for the application to be made in the prescribed form and to be accompanied by (a) a map drawn to the prescribed scale and showing the way or ways to which the application relates and (b) any documentary evidence on which the applicant wished to rely.

48 Those provisions, i e section 67(3) of the 2006 Act read with section 53(5) and Schedule 14 paragraph 1 of the 1981 Act, might have been D considered sufficient as an ordinary matter of construction to limit the exception created by section 67(3) to cases where an application conforming with the requirements of the 1981 Act had been made before 20 January 2005. But the drafter provided reinforcement by section 67(6): "For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of E Schedule 14 to that Act."

49 That subsection, as it appears to me, made it clear for the removal of doubt that section 67(3) of the 2006 Act applied only to an application made in time and in compliance with the formal requirements of paragraph 1 of Schedule 14. Put in negative terms, the saving provided by section 67(3) does not include applications purportedly made before the cut-off date which were substantially defective, whether or not the defects might F otherwise have been cured in one way or another. It is well understandable in the circumstances in which the 2006 Act was passed that Parliament should not have wished councils to be burdened potentially with a mass of non-conforming applications made in an attempt to beat the deadline.

50 I was initially attracted by Lord Carnwath JSC's argument for a more flexible approach, based on the precedents of *Oxfordshire County* G *Council v Oxford City Council* [2006] Ch 43 and *Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375 which he cites, but it is a truism that every statute must be construed in its own context. On full consideration I am persuaded that Lord Neuberger PSC and Lord Sumption JSC are right, having regard to the language of the statute and the legislative context to which I have referred.

H **LORD CARNWATH JSC**

Ground 1—prescribed scale

51 My initial reaction on reading the papers in this case was that the appeal should succeed on the first ground, substantially for the reasons given

by Lord Neuberger of Abbotsbury PSC and Lord Sumption JSC. It is an easy assumption that the draftsman must have had in mind an OS 1:25,000 map, or something of equivalent detail and quality. However, I am persuaded that this approach is too simplistic. The draftsman could have so specified but did not. Once it is accepted (as it is) that the word "drawn" does not connote any particular form of physical production, and that the plan need not be as detailed as an OS map (even one of 1:50,000 scale), nor professionally prepared, I see no convincing answer to the Court of Appeal's analysis. The fact that in practice applicants do normally use OS maps, or that there would be no hardship in requiring them to do so, does not seem to me to assist on the question of construction. I would therefore dismiss the appeal on the first ground for the reasons given by Lord Clarke of Stone-cum-Ebony JSC.

52 This conclusion makes it strictly unnecessary to decide the second ground. This challenges the principle that only "strict compliance" will suffice to save an application under section 67(6) of the 2006 Act (as decided in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138). However, since the point has been fully argued and may be material in other cases, it may be helpful to consider it. Furthermore, as will be seen, I regard it as somewhat artificial to separate the two issues, as the courts below have had to do (being bound by the decision of the Court of Appeal in that case). At this level we are able to take a broader view.

Ground 2—strict compliance

53 The second issue turns on the construction of section 67(6) of the 2006 Act. It needs to be read in its full statutory context, as already set out by Lord Clarke JSC. The starting point is section 53 of the 1981 Act in Part III, which imposes a duty on authorities to keep the definitive map "under continuous review", and to make modifications so far as required by the occurrence of any of the events specified in subsection (3). Those events are (in summary): (a) the coming into operation of "any enactment or instrument, or any other event" whereby a highway is stopped up, altered or extinguished or a new way created; (b) the expiration of a period sufficient to give rise to a presumption of dedication; or—

> "(c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows— (i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description . . ."

54 Subsection (5) allows any person to apply to the authority for an order under subsection (2) making such modifications "as appear to the authority to be requisite" in consequence of an event within paragraph (b) or (c) of subsection (3); and provides: "the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection." Schedule 14, paragraph 1 provides that the application is to be made "in the prescribed form", and accompanied by (a) a map "drawn to the prescribed scale and showing the way or ways to which the application

relates" and (b) copies of "any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application".

55 Section 67 of the 2006 Act provides for the extinguishment, subject to defined exceptions, of hitherto unrecorded rights of way for mechanically propelled vehicles. It applied generally from the date of "commencement", which for England was 2 May 2006 (defined under section 107(4)). This date applied also to the exceptions under subsection (3)(b) and (c). By contrast subsection (3)(a), which applies in this case, was related to an earlier "relevant date", defined for England as 20 January 2005 (section 67(4)). As explained to Parliament, this was the date on which ministers, following consultation, announced their intention to legislate, in the form of a document "The Government's framework for action". That paper did not contain any proposal for a cut-off date for applications prior to the commencement of the Act. That was introduced in the course of the parliamentary proceedings, in response to concerns that the authorities would be flooded by protective applications in the period before the 2006 Act took effect.

56 The critical subsection is section 67(6), by which for these purposes an application under section 53(5) of the 1981 Act is made "when it is made in accordance with paragraph 1 of Schedule 14 to that Act." In the *Winchester* case [2009] 1 WLR 138 an application for modification had been made before the relevant date, but had not been accompanied by the supporting "documentary evidence" as required by Schedule 14, paragraph 1(b). In those circumstances the court held that it had not been "made in accordance" with that paragraph before the relevant date and therefore did not come within the exception. Dyson LJ, with whom the other members of the court agreed, said, at para 54:

> "In my judgment, section 67(6) requires that, for the purposes of section 67(3), the application must be made strictly in accordance with paragraph 1. That is not to say that there is no scope for the application of the principle that the law is not concerned with very small things (de minimis non curat lex). Indeed this principle is explicitly recognised in regulation 8(1) of the 1993 Regulations. Thus minor departures from paragraph 1 will not invalidate an application. But neither the [redacted] application nor the [redacted] application was accompanied by any copy documents at all, although it was clear from the face of the applications that both wished to adduce a substantial quantity of documentary evidence in support of their applications. In these circumstances, I consider that neither application was made in accordance with paragraph 1."

That approach was followed in *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37, in which the only substantive judgment was again given by Dyson LJ.

The present proceedings

57 In the present case, before Supperstone J, it was argued that the defect which he had found in relation to the scale of the plan was no more than a "minor departure" permissible under the *Winchester* principle. He rejected that submission, holding that there were "material differences

between the presentation of the claimed ways on the application maps and their presentation on a 1:25,000 scale map", and that there was no difficulty in compliance: [2013] PTSR 302, paras 41–43. Permission to appeal that aspect of the judgment was refused.

58 In this court, [redacted] asks us to hold that the reasoning in the *Winchester* case [2009] 1 WLR 138 was erroneous, with the consequence that failure to comply strictly with the Regulations was not necessarily fatal to the application. In short, he submits that Dyson LJ was wrong to adopt a different approach under section 67(6) than would have been applied to an application under section 53(5) apart from the 2006 Act. Under general principles, he submits, failure to comply with procedural requirements, even those of more than "minor" significance, does not necessarily make an application void, and so incapable of having legal effect. Under the modern law, the question depends not on whether the procedural provision is mandatory or directory, or indeed whether the defect can be described as minor or de minimis, but (as Lord Steyn explained, *R v Soneji* [2006] 1 AC 340, para 23) the emphasis is "on the consequences of non-compliance . . . posing the question whether Parliament can fairly be taken to have intended total invalidity."

59 Applying those principles, he submits, the alleged defects in this case were not such as to render the application void. Their consequences were of no serious significance, since the authority were given all the information they needed to identify the proposal, to prepare their own more detailed plans (as indeed they did shortly after receipt of the application), and to carry out their own investigations. It was therefore properly treated from the outset as a legally effective application for the purposes of paragraph 1 of Schedule 14 to the 1981 Act, even if the authority would have been entitled to require the substitution of a compliant plan. It was thus, as at the date of its submission, "made in accordance with" that paragraph under section 67(6) of the 2006 Act.

60 For the authority, Mr George Laurence QC supports the *Winchester* decision [2009] 1 WLR 138 substantially for the reasons given by the Court of Appeal (in substance accepting his own submissions on behalf of the landowners in that case). Before discussing those submissions it is necessary to look in more detail at the reasoning of Dyson LJ in the earlier cases.

Dyson LJ's reasoning

61 The *Winchester* case involved two separate applicants. It is sufficient to refer to the facts relating to the first, [redacted] His application, made in June 2001 to the Hampshire County Council, was to modify the definitive map to upgrade a bridleway to a BOAT. The application referred to an appended list of documents, which identified some 25 maps and plans (the earliest dating back to 1739) with his comments. He did not include copies of these maps. It was treated as a valid application by the authority, which on 22 March 2006 resolved to make modifications accordingly. This decision was challenged by landowners affected by the route, on the grounds that there had been no valid application or determination within the time limits set by section 67 (inter alia) because the application had not been accompanied by copies of all the documentary evidence relied on.

62 The application was heard in the High Court by George Bartlett QC (President of the Lands Tribunal, and a judge with great practical experience

in this field), who rejected the challenge: [2008] RTR 173. In short he held that the requirement to submit documents was a procedural requirement which could be waived by the authority without affecting the validity of the application: paras 38–40. Alternatively, he interpreted the requirement to "adduce" the evidence to be relied on as not extending to evidence already before the council: para 45.

63 In the Court of Appeal, Dyson LJ did not disagree with the judge's approach in relation to the treatment of an application under section 53(5) of the 1981 Act itself. He distinguished this from the question before the court under section 67, at [2009] 1 WLR 138, paras 36–37:

> "36. . . . This question is not the wider question of whether it was open to the council to treat an application which was not made in accordance with that paragraph as if it had been so made because the failure could be characterised as a breach of a procedural requirement rather than a breach which was so fundamental that (to use the judge's language) the application failed to 'constitute an application' at all. I readily accept that the wider question is relevant and important in the context of applications made under section 53(5) generally and whether an authority has jurisdiction to make a determination pursuant to paragraph 3 of Schedule 14.
>
> "37. But the question that arises in relation to section 67(6) is not whether the council had jurisdiction to waive breaches of the requirements of paragraph 1. It is whether the applications were made in accordance with paragraph 1."

The purpose of section 67(6), he thought, was "to define the moment at which a qualifying application is made because timing is critical for the purpose of determining whether subsection (1) is disapplied": para 38. That moment was when an application was "made in accordance with paragraph 1." A subsequent waiver of the obligation to accompany the application with copies of documentary evidence could not operate "to treat such an application . . . as having been made in accordance with paragraph 1 when it was not."

64 In his view section 67(6) required strict compliance with each of the elements of paragraph 1, regardless apparently of considerations of practical utility. He rejected, for example, an argument that "strict insistence" that an application be accompanied by copy documents "serves no real purpose and confers no obvious advantage" over providing a list of the documents "particularly where the authority is already in possession of, or has access to, such documents." Such considerations might be relevant to the question whether a failure to comply with paragraph 1 should be waived, but not to whether an application has been made "in accordance with" paragraph 1: paras 44–45. Similarly he was unmoved by arguments that strict interpretation could lead to absurdity, for example if the application listed a number of documents but by oversight omitted some of them, the absurdity possibly being "sharpened by the fact that the authority has the originals in its possession . . ." Even a defect of that kind was relevant only to the question of waiver, not to validity for the purpose of section 67(6): paras 48–49. The only exception he allowed was if copies were impossible to obtain, on the basis of the principle that "law does not compel the impossible": para 50.

65 The consequences of that narrow approach are strikingly illustrated by the following case, *Maroudas v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37. The court reversed the judgment of the Administrative Court ([2009] EWHC 628 (Admin), Judge Mackie QC), to which reference can be made for a fuller account of the history. The proceedings had taken the form of an application to quash the decision of the Secretary of State, made by an inspector in May 2008 following a hearing, to confirm a modification order made in response to an application originally made under section 53(5).

66 The application had been made as long ago as February 1997, several years before the cut-off date later adopted in the 2006 Act. It had not itself been signed or dated, nor accompanied by a plan showing the way in question. However the council had helpfully responded a month later enclosing a summary and plan, and asking for confirmation that the proposed reclassification extended to the whole of the identified route. The applicant replied by signed letter asking for the whole route to be included. The authority apparently proceeded to deal with it on that basis as a valid application. As far as one can judge from the reports, no objection was taken to the form of the application until the hearing before the inspector some 11 years later. By an unfortunate coincidence (from the applicant's point of view) the hearing took place on 30 April 2008, the day after the promulgation of the *Winchester* judgment, on which the objector was thus able to rely.

67 On these facts the judge upheld the inspector's decision to treat the application as validly made by the relevant date. As he observed, there had been nothing "opportunistic" about the application, made long before any hint of the proposals which led in due course to the 2006 legislation. Although he was bound by the *Winchester* decision, and he accepted that the defects in the original application could not be treated as "minor", he was entitled to look "at the substance of the matter", which was, at para 25, that

> "by the time the letter of 22 April 1997 was written it was perfectly clear what the application related to. There was a map, as one sees from 'enclosed is a summary plan of the application' in the letter of 25 March 1997, and a signature and a date. No one would, or could, have been misled about what happened after that. [redacted]ghtly had to accept that he would have no grounds at all for his application if, instead of the exchange of letters, the council had gone through the bureaucratic, or some would say necessary, step of returning the form to [the applicant] to sign and amend, rather than resolving the matter on an exchange of correspondence. That seems to me to move proper strictness into unnecessary bureaucracy."

68 The Court of Appeal disagreed. In particular, the applicant's failure to sign and date the application, and his failure to submit a plan, were not cured by the subsequent exchanges, at [2010] NPC 37, paras 33 and 35:

> "33. . . . the lack of a date and signature in the application form can in principle be cured by a dated and signed letter sent *shortly* after the submission of the form, where the omissions are pointed out and the council is asked to treat the application as bearing the date of the letter and the signature of the author of the letter. But the lack of a date and, in particular, the lack of a signature are important omissions. The signature

A is necessary to prove that the application is indeed that of the person by whom it is purportedly made. If the application form remains unsigned for a substantial period of time, I would not regard that as a minor departure from the statutory requirement that it should be signed. The fact that the application was unsigned for some ten weeks in this case is of itself a strong reason for holding that there was a substantial departure from the strict requirements of paragraph 1 of Schedule 14."

B "35. The final point is that the plan enclosed with the council's letter of 25 March was not sent back by [redacted] with his letter of 22 April. [redacted] never sent an accompanying map. The absence of an accompanying map is an important omission just as is the absence of documentary evidence on which an applicant wishes to rely (as *Winchester* demonstrates). [redacted]ase is that the plan which was C enclosed with the council's letter of 25 March was the accompanying map and that by his letter [redacted] was agreeing with the council that it should so treat it. But [redacted] letter says nothing about the enclosed plan. There is nothing to indicate that he even looked at it. In view of his indifference to what the council was asking, it seems unlikely that he would have had any interest in the plan at all."

D *Discussion*

69 I start from the general principle that procedural requirements such as those in the 1981 Act should be interpreted flexibly and in a non-technical way. There are close parallels with the provisions relating to applications to register village greens, considered by the Court of Appeal in *Oxfordshire County Council v Oxford City Council* [2006] Ch 43 (approved on this point E by Lord Hoffmann in the House of Lords: [2006] 2 AC 674, para 61). The question there was the power to amend an application for registration, in the absence of any specific provision in the Regulations permitting amendment. In giving the judgment of the Court of Appeal (paras 101–112), I cited the guidance of Lord Keith of Kinkel, dealing with similar arguments in a case concerning the amendment of details submitted under an outline planning F permission: *Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375. He said, at p 397:

> "This is not a field in which technical rules would be appropriate, there being no contested lis between opposing parties. The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the circumstances. That being so, there is no good G reason why amendment of the application should not be permitted at any stage, if that should prove necessary in order that the whole merits of the application should be properly ascertained and decided upon."

70 The *Inverclyde* case has added relevance in the present context since it also involved a time limit. Conditions on the permission imposed a three-year time limit for submission of details. Further, the Act in question there H provided that an application for approval made after that date should be treated as not made in accordance with the terms of the permission. The general development order governing submission of details contained no specific provision for amendment. The authority accepted that amendments could be made within the three-year time limit, but not after it had expired. Of that Lord Keith said simply, at p 397: "an amendment which would have

the effect of altering the whole character of the application, so as to amount in substance to a new application, would not be competent". A

71 Such a flexible approach is particularly appropriate in the context of an application to modify the definitive map. A developer submitting details under an outline planning permission is doing so generally for his own benefit, and it is his responsibility to make sure that the details comply with the planning permission and other requirements. In a case of any complexity, the details will generally be professionally prepared. By contrast, under section 53 of the 1981 Act the primary duty to keep the definitive map up to date and in proper form rests with the authority, as does the duty (under section 53(3)(c)) to investigate new information which comes to their attention about rights omitted from the map. An application under section 53(5), which may be made by a lay person with no professional help, does no more than provide a trigger for the authority to investigate the new information (along with other information already before them) and to make such modification "as appears to [them] to be requisite." B C

72 The deputy judge in the *Winchester* case [2009] 1 WLR 138 cited the guidance given by Lord Woolf MR in *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354 (a judgment noted with approval by Lord Steyn in *R v Soneji* [2006] 1 AC 340, para 19). In a passage headed "What should be the approach to procedural irregularities?", Lord Woolf MR referred to recent authority qualifying the traditional mandatory/directory test, and said, at [2000] 1 WLR 354, 362: D

> "the right approach is to regard the question of whether a requirement is directory or mandatory as only at most a first step. In the majority of cases there are other questions which have to be asked which are more likely to be of greater assistance than the application of the mandatory/directory test. The questions which are likely to arise are as follows. E
>
> "1. Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.) F
>
> "2. Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) I treat the grant of an extension of time for compliance as a waiver.
>
> "3. If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequence question.) G
>
> "Which questions arise will depend on the facts of the case and the nature of the particular requirement. The advantage of focusing on these questions is that they should avoid the unjust and unintended consequences which can flow from an approach solely dependent on dividing requirements into mandatory ones, which oust jurisdiction, or directory, which do not. If the result of non-compliance goes to jurisdiction it will be said jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver." H

73 I find this passage particularly helpful since it distinguishes clearly between two logically distinct issues: first, whether as a matter of construction a particular procedural rule is capable of being satisfied

("fulfilled") by "substantial compliance"; secondly, whether even if the rule is not so satisfied a failure to comply can as a matter of discretion be waived by the relevant authority. For most practical purposes the distinction is immaterial. However, it can be significant in a case such as the present where timing is important. In my view, if the statutory rule properly construed can be satisfied by substantial compliance, it is no misuse of language to say that an application made before the relevant time, in a form which meets that standard, is made "in accordance with" the rule.

74 As I understand his two judgments, Dyson LJ proceeded on the basis that any flexibility in the exercise of the section 53(5) procedure could only be explained as a matter of waiver by the authority. It therefore had no relevance to whether the application itself had been made "in accordance with" the statutory requirements for the purpose of section 67 at the relevant time. Indeed, in the *Maroudas* case [2010] NPC 37 he appears to have gone even further. The only latitude allowed was the possibility of curing the defects by a submission made "shortly" after the initial application. Later waiver by the authority of any procedural deficiencies, even if made long before the cut-off date, would not be enough.

75 In my view, with respect, this approach was too narrow. For the reasons I have given, this is not a context in which either statute needs to be read as requiring more than substantial compliance to achieve validity.

76 The words "in accordance with" in section 67(6) do not necessarily imply anything more than compliance which would in any event be required by the terms of section 53(5) and Schedule 14. Dyson LJ appears to have attached importance to the statutory purpose of "defining the moment" by reference to which section 67(1) is disapplied. But the same could have been said of the planning condition in the *Inverclyde* case 43 P & CR 375. It is not clear why that consideration should require a different approach under section 67 than under the governing section.

77 There remains a legitimate question as to the purpose of section 67(6). If it merely reproduces the effect of section 53(5) taken with Schedule 14, why was it necessary to include it at all? [redacted] answer is that it was probably intended to make clear that the date was to be fixed by reference only to paragraph 1 of Schedule 14, without regard to the provision (in paragraph 2) for service on landowners. I see some force in that suggestion. It can be said against it that paragraph 2 as it stands leaves no room for ambiguity on that point, since it requires in terms a notice that "the application *has* been made". On that view section 67(6) adds nothing. However, the same point could be made of section 67(7). Even without it, there would have been no reason to read subsection (3)(c)(i) as requiring the applicant to be using, or able to use, the right of way in question. Alternatively, it may be that the purpose of section 67(6) was simply to make clear that what was required was a substantially complete application; in other words a bare application would not be sufficient, if it was not accompanied by the relevant information required by the rule (whether or not precisely in the prescribed form).

78 It has to be remembered that section 67(3) was retrospective in effect. In the *Inverclyde* case there would have been no obvious hardship in tying the applicant to the three-year limit set by the condition, of which he had notice at the time of the permission. By contrast, the cut-off date under section 67(3) was deliberately fixed by reference to the date of the announcement of the legislation, and so as to allow no further opportunity

for an applicant to improve his position. The legislative purpose no doubt was to identify for preservation genuine applications made before that date. This was understandable as a means of limiting pre-emptive applications in the period before the Act came into effect. But that purpose did not justify or require subjecting them retrospectively to standards of procedural strictness which had no application at the time they were made.

79 It is unnecessary for present purposes to determine whether the *Winchester* case [2009] 1 WLR 138 was correctly decided on its own facts. Nor should this judgment be seen as encouragement to resurrect applications rejected in reliance on it. I would however question its extension to a case, such as the *Maroudas* case [2010] NPC 37 where the defects in the original application had been resolved to the satisfaction of the authority, and waived by them, long before the cut-off date. I would respectfully echo the comment of the deputy judge in the *Maroudas* case that this was "to move proper strictness into unnecessary bureaucracy". As was conceded, it would have been simple for the applicant, if required to do so, to have resubmitted the application in strictly correct form, but neither the authority nor anyone else thought that necessary. Without a crystal ball he would have had no reason to do so. Yet that wholly excusable failure resulted more than a decade later in the application and all that followed being declared invalid. I would have expected the draftsman to have used much clearer wording in section 67(6) if he had intended to achieve such a surprising and potentially harsh result.

Conclusion

80 As I suggested at the beginning of this judgment, there is some overlap in the two grounds of appeal. Under ground 1, for the reasons given by Lord Clarke JSC, the wording of the definition does not on an ordinary reading bear the interpretation urged on us by the council. By the same token, under ground 2, the fact that the draftsman has not thought it necessary to define more precisely the form and contents of the application map can itself be taken as an indication against implying a requirement for unusually strict compliance, under either section 53 or section 67.

81 For these reasons I would dismiss the appeal on both grounds.

LORD NEUBERGER OF ABBOTSBURY PSC

Introductory

82 The relevant facts and statutory provisions have been set out by Lord Clarke of Stone-cum-Ebony JSC, and they need not be repeated. Two questions arise. The first is whether the applications submitted to the Dorset County Council by [redacted] on behalf of the Friends of Dorset's Rights of Way ("the applications"), purportedly made under section 53(5) of the 1981 Act ("section 53(5)"), complied with the requirements of paragraph 1(a) of Schedule 14 to that Act ("Schedule 14"), in the light of the requirement in regulation 8(2) of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (the "1993 Regulations"). The second question, which only arises if the answer to the first question is "no", concerns the consequences of such non-compliance in the light of the provisions of section 67 of the 2006 Act.

A 83 In disagreement with Lord Clarke JSC and the Court of Appeal, and in agreement with Supperstone J, I consider that the answer to the first question is that the applications did not comply with the requirements of paragraph 1(a) of Schedule 14 as the accompanying map was not to the required scale, and that the answer to the second question is that the applications were ineffective as a result of section 67, and in particular subsection (6) thereof. My reasons for these conclusions are as follows.

B

The validity of the applications: the 1:25,000 scale requirement

84 The applications were accompanied by documents which were enlarged photocopies of plans which had been prepared on a scale of 1:50,000, and which, as a result of the enlargement exercise, were on a scale of around 1:20,000. In those circumstances, the first question is whether C such enlarged photocopies constituted maps "drawn to the prescribed scale" within paragraph 1(a) of Schedule 14, which as a result of regulation 8(2) and regulation 2 of the 1993 Regulations had to be "on a scale of not less than 1:25,000".

85 A map of a particular area is a document which shows in reduced, two-dimensional form, normally with markings, symbols or annotations, D what is on the ground in that area. It is almost inevitable that the "map" accompanying an application under section 53(5) will be a copy (either in printed form or a photocopy of a printed form) of an original map drawn by an individual, a group of individuals or a machine. The court was told that, in the experience of those involved in these proceedings, a photocopy of the appropriate section of a published copy of the relevant OS map is invariably used by applicants under section 53(5). That is entirely unsurprising, E although there is no reason why the map accompanying a section 53(5) application should not be a copy of another published map, or an original plan, drawn for the purpose of the application, provided, of course, that it is "drawn to the prescribed scale".

86 Where an applicant uses a copy of an original map, the appellant council contends that the document only complies with the requirements of F paragraph 1(a) of Schedule 14 if it is a copy of a map which was prepared on a scale of at least 1:25,000, whereas the respondent claimants argue that it complies with these requirements if the copy is on a scale of at least 1:25,000, even if the map from which the copy was made was on a scale of less than 1:25,000.

87 The words used in paragraph 1 of Schedule 14 and in regulations 8(2) and 2 of the 1993 Regulations could justify either G contention as a matter of pure language, although, as explained in para 90 below, I consider that the more natural meaning is that contended for by the council. For that reason, but also for two other reasons, I prefer the council's case.

88 First, the purpose of imposing a minimum scale for the accompanying map was, in my view, because it could be expected to show a level of detail which would not normally be shown on a map prepared on a smaller scale. H That would enable the council to appreciate the nature of the land and the various features close to the way in question. The only justification for the imposition of a minimum scale on the claimants' case could be that a smaller scale plan would not show the way clearly, but that is a fanciful suggestion in my opinion, not least because paragraph 1(a) of Schedule 14 already contains

a requirement that the way be "[shown]" on the plan, and that must mean "clearly [shown]". A

89 It is true that applicants could draw their own map showing no detail, but that unlikely possibility is not an answer to the point that those responsible for the 1993 Regulations must have envisaged (rightly as events have turned out) that an OS map would normally be the document from which the copy map was made. Given that OS maps to a scale of 1:25,000 are easily obtainable in respect of all parts of England and Wales, it would be very eccentric for an applicant to incur the cost and time of preparing, or paying someone else to prepare, a new plan or map to that scale for the purpose of a section 53(5) application. That point is underlined by the fact, already mentioned, that applicants appear invariably to use photocopies of OS maps, and the fact that definitive maps are always based on OS maps. B

90 Secondly, it is not an entirely natural use of language to describe an enlarged photocopy of a map originally prepared on a scale of 1:50,000, as "drawn" on a higher scale. To my mind at any rate, a map is "drawn" to a certain scale if it is originally prepared to that scale. One might fairly describe a doubly magnified photocopy of a 1:50,000 map as "being on" a scale of 1:25,000, but I do not think that it would be naturally described as having been "drawn to" a scale of 1:25,000. The word "drawn" in paragraph 1 of Schedule 14 must, of course, be given a meaning which is appropriate in the light of modern technology and practice, but I do not see how that impinges on the natural meaning of the expression in the present case. C D

91 Thirdly, the operative regulation in the present case, regulation 8(2) of the 1993 Regulations, states that regulation 2 is to apply to an application. Regulation 2 contains the express requirement "A definitive map shall be on a scale of not less than 1:25,000". It appears to me therefore incontrovertible that if a map satisfies regulation 8(2), it must also satisfy regulation 2. With due respect to those who think otherwise, I do not see how regulation 2 can have one meaning in relation to a definitive map and another meaning in relation to a map accompanying an application. Bearing in mind the public importance of a definitive map, it strikes me as very unlikely that the drafter of the 1993 Regulations could have envisaged that such a map could be an enlarged photocopy of a map which had been prepared on a scale of significantly less than 1:25,000. I also note that regulation 2 is foreshadowed by section 57(2) of the 1981 Act, which refers to "Regulations" which can "prescribe the scale on which maps are to be prepared": again, it does not seem to me to be a natural use of language to describe a doubly magnified photocopy of a 1:50,000 scale map as "prepared" on a scale of 1:25,000. E F G

The effect of section 67 of the 2006 Act on the applications

92 The status of the applications if the maps which accompanied them failed to comply with the requirements of paragraph 1 of Schedule 14 requires a little analysis. Confining myself for the moment to the 1981 Act and the 1993 Regulations, it appears to me that the following three propositions are correct. First, the council could have treated the applications as valid, and effectively waived the failure to comply with the map scale requirements. Secondly, if the council had taken the point that the enlarged photocopies did not comply with the requirements of H

A paragraph 1 of Schedule 14, then the defect could not simply have been treated as if it had not existed. Thirdly, in such an event, subject to any special reason to the contrary (e g the claimants not having availed themselves of ample opportunity to do so after warnings), the claimants would have been entitled to remedy the defect on the applications by submitting maps which were properly compliant with paragraph 1 of Schedule 14.

B **93** In relation to each of these three propositions, it seems to me that Lord Steyn's observations in *R v Soneji* [2006] 1 AC 340, paras 14 and 23, are in point. He said that where "Parliament casts its commands in imperative form without expressly spelling out the consequences of a failure to comply", "the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be C taken to have intended total invalidity", which is "ultimately a question of statutory construction."

94 As to the first proposition, it seems to me that the purpose of the requirement in paragraph 1(a) of Schedule 14 is to enable the council to whom a section 53(5) application is made to be assisted as to the identity, location, extent and surroundings of the way, when dealing with the application. Accordingly, if the council is content to accept a less helpful or D informative map than it was entitled to insist on, that is a matter for the council, and there is no basis for holding the application invalid.

95 As to the second proposition in para 92 above, the notion that the defect could simply have been overlooked seems to me to fly directly in the face of the conclusion that paragraph 1 of Schedule 14, when read together with the 1993 Regulations, requires a section 53(5) application to be E accompanied by a map drawn to a certain minimum scale. If an application does not comply with that requirement, and the failure is not waived by the council, the application is invalid as it stands. Unless it can be said that the failure is de minimis (a suggestion which was rightly rejected by Supperstone J in this case), the court would not be giving effect to the statute if it simply overlooked the defect.

F **96** That brings one to the third proposition in para 92 above. I do not consider that it would be consistent with the purpose of the 1981 Act, and in particular section 53 and Schedule 14, if an application which was defective because it was accompanied by a map on too small a scale, could not be validated by the subsequent provision of a map on the appropriate scale. On the contrary. The point was well put in *Inverclyde District Council v Lord Advocate* (1981) 43 P & CR 375 (cited and followed by Carnwath LJ in G *Oxfordshire County Council v Oxford City Council* [2006] Ch 43, paras 106–109), by Lord Keith of Kinkel, who held that it was open to an applicant to amend an application after the final date by which the application had had to be made. He said, at p 397:

> "The planning authority must simply deal with the application procedurally in a way which is just to the applicant in all the H circumstances. That being so, there is no good reason why amendment of the application should not be permitted at any stage . . ."

97 Accordingly, in the absence of any other statutory provisions, I would have held that, although the applications were invalid for the purposes of section 53(5) because they did not comply with the requirements

of Schedule 14, they could effectively be saved by the applicant submitting maps drawn to the stipulated scale.

98 Having said that, such a conclusion is not available in my opinion in this case, because the provisions of section 67 of the 2006 Act, on which [redacted] (a chartered surveyor who intervened on this appeal) rightly placed great emphasis in his brief submission, apply in this case. Section 67(1) extinguishes a certain type of public right of way (namely one "for mechanically propelled vehicles") if it is not "shown in a definitive map". Paragraphs (a) to (c) of section 67(3) exclude certain ways from the ambit of section 67(1); only paragraph (a) is directly in point, and it refers to ways in respect of which "an application was made under section 53(5) of the [1981 Act]". However, and here lies the problem for the claimants, section 67(6) states: "For the purposes of subsection (3), an application under section 53(5) of the 1981 Act is made when it is made in accordance with paragraph 1 of Schedule 14 to that Act".

99 As Mr Gorge Laurence QC says on behalf of the council, the observations of Lord Steyn in *R v Soneji* [2006] 1 AC 340 cannot apply to the position under section 67, because this is a case where "Parliament . . . [has] expressly [spelled] out the consequences of a failure to comply" with its "command", in that section 67(1) expressly provides that a right of way is extinguished unless (for present purposes) section 67(3)(a) applies. To adopt the words of Lord Woolf MR in *R v Secretary of State for the Home Department, Ex p Jeyeanthan* [2000] 1 WLR 354, 362, quoted by Lord Carnwath JSC in para 72, Parliament in section 67(1) and (6) has spelled out "the consequence of the non-compliance", and as "the result of non-compliance goes to jurisdiction . . . jurisdiction cannot be conferred where it does not otherwise exist by consent or waiver."

100 Unless section 67(6) is mere surplusage, it seems to me that it can only sensibly be interpreted as meaning that, if a section 53(5) application has been made, but that application does not comply with the requirements of paragraph 1 of Schedule 14, then it is not to be treated as an application for the purposes of section 67(3)(a). As that is what happened in the present case, it must follow that the ways the subject of the applications have been extinguished pursuant to section 67(1).

101 It seems to me impossible to give section 67(6) any meaning if it does not have the effect for which Mr Laurence contends. The ingenious notion that it was intended to make it clear that only paragraph 1, and not paragraph 2, of Schedule 14 had to be complied with is wholly unconvincing, because, as Lord Carnwath JSC says in para 77, it is clear from the wording of paragraph 2 itself that it only applies after an application has been made.

102 I find the notion that section 67(6) is surplusage very difficult to accept. It is not as if the choice was between a strained meaning and no meaning, as the natural effect of the words of the subsection is as I have described. And that meaning appears to me to be entirely consistent with the purpose of section 67, which is to extinguish certain rights of way if they are not registered, subject to certain exemptions including those ways subject to section 53(5) applications. While it may seem harsh, it seems to me quite consistent with the purpose of the section to exclude from that class of exemption cases where the application is defective (even though it may otherwise be saveable). I do not consider that the court would be performing its duty of reflecting the intention of Parliament as expressed in legislation if

A it effectively ignored or discarded a subsection simply because it did not like the consequences, or it considered that they were rather harsh.

103 It is said on behalf of the claimants by [redacted] who presented his arguments very well, that section 67 was retrospective in its effect and it is therefore appropriate to interpret a provision such as section 67(6) generously to a party who has made a defective section 53(5) application. I am unpersuaded by that. First, the effect of section 67 was only backdated to the moment when the Government announced its intention to enact it. Secondly, the claimants' case does not involve interpreting section 67(6) so much as discarding it. Thirdly, there is no correlation between the retrospectivity and the timing of the failure to comply or opportunity to remedy the failure to comply.

B

104 It is also said that there is some surplusage in section 67 anyway. Although that was not gone into in any detail, I am unconvinced that it is true. However, even if it is, I do not see how it would assist the claimants' case.

C

105 The notion that my conclusion as to the effect of section 67(6) leads to absurdity, because an application could thereby be invalidated by virtue of a small oversight, does not impress me. It is an argument which can be raised in relation to any provision, whether contractual or statutory, which requires a step, which has potentially beneficial consequences for the person who is to take it, to be taken by a certain date which cannot be moved. An obvious example is the service of a statutory or contractual notice: if a defective notice is served and is not corrected before the stipulated date, then the right to serve the notice, and the consequential benefits, are irretrievably lost, even if the defect was due to an oversight.

D

E

Conclusion

106 For these reasons (which on the second question are very similar to those contained in the judgment of Dyson LJ in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138), and for the reasons given in the brief judgment of Lord Sumption JSC, I would have allowed this appeal.

F

LORD SUMPTION JSC

107 There are two reasons why regulations 2 and 8 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 might have prescribed the use of a map on a scale of not less 1:25,000. One is because a map on that scale showing the relevant byway could be expected to show more of the surrounding detail than a map on a smaller scale. The other is that it was desired to ensure that the map should be visible without unduly straining the eyesight of those using it. In my opinion it is manifest that the requirement was imposed for the first of those reasons and not for the second. It is true that the Regulations do not specify what maps of the prescribed scale must be used and that different maps may vary in the amount of surrounding detail shown. It is also true that an applicant supplying a map under regulation 8 might in theory satisfy the requirement by producing a 1:25,000 scale map with less surrounding detail than some 1:50,000 scale maps. It is also true that he might satisfy it by producing a home-made map on which the byway was shown with little or no surrounding detail (although this course would clearly not be open to a local

G

H

authority producing a definitive map under regulation 2). But I do not regard this as relevant to the construction of the Regulations, because I decline to construe them on the assumption that applicants could be expected to complete their applications in the most obtuse and unhelpful manner consistent with the language. In my opinion the Regulations have been drafted on the assumption that a map would be used in which a 1:25,000 scale map would have sufficient surrounding detail, and in any event more than a 1:50,000 map. A magnified copy of a 1:50,000 map is therefore not the same thing as a 1:25,000 map, and does not comply with regulation 8.

108 Section 67(6) of the Natural Environment and Rural Communities Act 2006 provides that for the purposes of subsection (3) an application seeking modifications to the definitive map means one which complies with Schedule 14, paragraph 1 of the Wildlife and Countryside Act 1981. That means one which includes a map drawn on the prescribed scale. The application in this case was therefore not an application of the kind referred to in section 67(3) of the 2006 Act. It follows that on the relevant date any right of way for mechanically propelled vehicles was extinguished. Since the defect might in theory have been made good after the relevant date, this may be described as a technical point. But sometimes technicality is unavoidable. Where the subsistence of rights over land depend on some state of affairs being in existence at a specified date, it is essential that that state of affairs and no other should be in existence by that date and not later.

109 For these reasons, which are the same as those of Lord Neuberger of Abbotsbury PSC, I would have allowed the appeal.

Appeal dismissed.

JILL SUTHERLAND, Barrister

Supreme Court

*Regina (Lee-Hirons) *v* Secretary of State for Justice

2015 Feb 24

Baroness Hale of Richmond DPSC,
Lord Clarke of Stone-cum-Ebony, Lord Hodge JJSC

APPLICATION by the claimant for permission to appeal from the decision of the Court of Appeal [2014] EWCA Civ 553; [2015] 2 WLR 256

Permission to appeal was given.

Appendix 5

Order of Supreme Court 13 April 2015

IN THE SUPREME COURT OF THE UNITED KINGDOM

13 April 2015

Before:

Lord Neuberger
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Toulson

R (on the application of Trail Riders Fellowship and another) (Respondents) *v* Dorset County Council (Appellant)

AFTER HEARING Counsel for the Appellant, Counsel for the First Respondent and the Intervener on 15 January 2015 and

THE COURT ORDERED THAT

1) The appeal be dismissed

2) The claim for judicial review of the Appellant's decision of 2 November 2010 succeeds

3) By 4.00pm on 15 April 2015 the Appellant will pay the First Respondent's costs of the appeal in the agreed sum of £10,000 (inclusive of VAT) and

IT IS DECLARED that

4) The five applications dated 14 July 2004 (ref. T338), 25 September 2004 (ref. T339), 21 December 2004 (ref. 350), 21 December 2004 (ref. 353) and 21 December 2004 (ref. T 354) made to the Appellant under section 53(5) of the Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981.

[redacted]

Registrar
13 April 2015

Appendix 6

Email from Registrar of the Supreme Court 5 November 2019, conveying Lord Carnwath's response to a proposed application to vary the order of the Supreme Court

From: [redacted]@supremecourt.uk>
Sent: 05 November 2019 10:42
To: [redacted]@dorsetcc.gov.uk>; [redacted]
Cc: UKSC Registry <registry@supremecourt.uk>
Subject: r (app trail riders v dorset cc

Lord Carnwath has directed me to write to the parties as follows:

"The court sees no reason to vary the terms of the order which was agreed between the parties, and reflected the form of the relief sought in the original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage."

Kind regards, and thanks for your patience!

[redacted]
Deputy Registrar of the Supreme Court of the United Kingdom and Costs Clerk in the Judicial Committee of the Privy Council
The Supreme Court of the United Kingdom and the Judicial Committee of the Privy Council
Parliament Square, London, SW1P 3BD
DX 157230 PARLIAMENT SQUARE 4
[redacted]

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Appendix 7

[redacted] (for the TRF) letter to the Planning Inspectorate 16 December 2019

brain
chase
coles
Solicitors

Haymarket House
20/24Wote Street
Basingstoke
Hampshire RG21 7NL

Tel [redacted]
Fax
DX
ww

FAO Helen Sparks
Rights of Way Section
The Planning Inspectorate
3A Eagle
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN

By email only – [redacted]@planninginspectorate.gov.uk

Your Ref: FPS/C1245/14A/10 16th December 2019
Our Ref: MSS/SS/TRF74

Dear Sirs

Re: Our Client – Trail Riders Fellowship
FPS/C1245/14A/10 – Dorset Council Refusal to upgrade Bridleway 14, Beaminster, to a Byway Open to All Traffic

We refer to your letter 20 November 2019 and [redacted] submission 16 November 2019.

The Court of Appeal in the case Trail Riders Fellowship v Dorset CC [2013] EWCA Civ 553, by order dated 20 May 2013 declared that five applications, including that relating to Bridleway 14 Beaminster (Dorset T353), were made in accordance with paragraph 1 Schedule 14 Wildlife and Countryside Act 1981. A copy of the order dated 20 May 2013 is enclosed herewith as Annex 1.

The Supreme Court ([2015] UKSC 18, [2015] 1 WLR 1406) dismissed an appeal against the Court of Appeal's decision.

Whether or not the application, Dorset T353, complied with paragraph 1 Schedule 14 has been disposed of by the declaration of the Court of Appeal, as upheld by the Supreme Court.

[redacted] and Dorset CC sought to reopen that issue by applying to the Supreme Court. That attempt was misconceived, given the terms of the declaration and the disposal of the appeal in the Supreme Court. That application has been rejected by the Supreme Court, for the reasons set out by Lord Carnwath: '*The court sees no reason to vary the terms of the order which was agreed between the parties, and reflected the form of the relief sought in the*

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original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage.' A copy of Lord Carnwath's decision is enclosed herewith as Annex II.

Accordingly, not only had any question as to the compliance with paragraph 1 Schedule 14 of this application already been finally disposed of in the Court of Appeal and the Supreme Court, but the misconceived attempt to reopen this question has also been squarely rejected by the Supreme Court.

There is no further right of appeal either from the original decision of the Supreme Court, nor from the Supreme Court's rejection of Dorset CC and [redacted] application. [redacted] purported criticisms of Lord Carnwath's reasoning are ill-judged and also misconceived (and given the absence of any further right of appeal or possibility of reopening the decision are neither here nor there).

The TRF has incurred costs in responding to [redacted] misconceived collateral attack on a decision of the Supreme Court. The TRF regards [redacted] submissions as unreasonable conduct and reserves the right to seek its costs from [redacted]

Yours faithfully

[redacted]
[redacted]@brainchasecoles.co.uk)

Annex 1

Neutral Citation Number: [2013] EWCA Civ 553

Case No: C1/2012/2689 + 2689(A)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT (SUPPERSTONE J)
REF: CO899/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 20th May 2013

Before :

Lord Justice Maurice Kay Vice President of the Court of Appeal, Civil Division
Lady Justice Black
and
Lady Justice Rafferty

- - - - - - - - - - - - - - - - - - -

Between :

THE QUEEN (on the application of)

.(1) TRAIL RIDERS FELLOWSHIP — **First Claimant / Appellant**

.(2) [redacted] — **Second Claimant**

and

DORSET COUNTY COUNCIL — **Defendant / First Respondent**

and

.(1) SECRETARY OF STATE FOR THE ENVIRONMENT, FOOD AND RURAL AFFAIRS — **First Interested party / Second Respondent**

.(2) [redacted] — **Second Interested party / Third Respondent**

- - - - - - - - - - - - - - - - - - -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- - - - - - - - - - - - - - - - - - -

[redacted] (instructed by **Brain Chase Coles**) for the **Appellant**
Mr George Laurence QC (instructed by **Dorset County Council** for the **(1st Respondent)**
Treasury Solicitors (2nd Respondent did not appear)
[redacted] **(3rd Respondent in person)**

Judgment

Lord Justice Maurice Kay :

1. Access to the countryside often gives rise to controversy. The existence and extent of public rights of way is now regulated by Part III of the Wildlife and Countryside Act 1981 (the 1981 Act). It requires surveying authorities to maintain definitive maps and statements. They are given "conclusive evidence" status by section 56, which distinguishes between footpaths, bridleways and byways open to all traffic (BOATs'). Definitive maps and statements have to be kept under continuous review (section 53(2)(b)). Any person can apply to the relevant authority for an order which makes such modifications as appear to the authority to be requisite in consequence of certain events (section 53(5)). The prescribed events include the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows that a right of way which is not shown in the map or statement subsists or that a highway shown in the map or statement as a highway of a particular description ought to be there shown as a highway of a different description (section 53(3)). An application pursuant to section 53(5) must comply with requirements set out in Schedule 14. This case is concerned with those requirements.

2. In 2004, [redacted], a member of Friends of Dorset's Rights of Way, submitted five applications to Dorset County Council, the appropriate surveying authority, seeking modification orders in relation to the definitive map and statement. His aim was to achieve the upgrading of existing rights of way from footpath or bridleway to BOAT status and/or to achieve BOAT status for other lengths of path. In due course, [redacted] and his organisation were replaced as applicants by [redacted] and the Trail Riders' Fellowship (of which [redacted] is a member). The objects of the Trail Riders' Fellowship are "to preserve the full status of vehicular green lanes and the rights of motorcyclists and others to use them as a legitimate part of the access network of the countryside ...". Essentially, the Trail Riders' Fellowship seeks to establish that rights of way presently depicted in definitive maps and statements as footpaths or bridleways should be reclassified as BOATs', thereby enabling members of the Fellowship and others to ride their motorcycles on them. As [redacted] says in his witness statement, this is an emotive issue. However, at this stage we are not concerned with the merits of the applications or the quality of the general evidence said to support them. Our sole concern is with whether, as a matter of form, the applications complied with the statutory requirements.

The statutory requirements

3. Paragraph 1 of Schedule 14 provides:

> "An application shall be made in the prescribed form and shall be accompanied by –
>
> (a) a map drawn to the prescribed scale showing the way or ways to which the application relates; and
>
> (b) copies of any documentary evidence (including statements of witnesses) which the applicant wishes to adduce in support of the application."

The present dispute is concerned with the maps submitted with the applications.

4. "Prescribed" in paragraph 1 (a) means prescribed by regulations made by the Secretary of State (paragraph 5 (1)). The relevant regulations are the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (the 1993 Regulations), regulation 2 of which provides:

> "A definitive map shall be on a scale of not less than 1:25,000 but where the surveying authority wishes to show on a larger scale any particulars required to be shown on the map, in addition, an inset map may be used for that purpose."

5. By regulation 8(2), regulation 2 "shall apply to the map which accompanies such an application as it applies to the map contained in a modification or reclassification order"

6. Thus, in simple terms, when a person applies for a modification order, he must show the right of way for which he contends on a map drawn to a scale of not less than 1:25,000.

The issue

7. In his witness statement, [redacted] describes how he produced the maps which he submitted with the applications:

> "The maps were generated using software installed on my personal computer. The software is called 'Anquet' and the relevant version number was VI …
>
> The software is designed for the viewing and printing of digitally encoded maps. The digitally encoded maps from which the application maps were generated were purchased by me and were supplied on a CD-ROM. The packaging on the CD-ROM describes the map as 'Anquet Maps: the South Coast'. The packaging refers to 1:50,000 scale and states 'mapping sourced from Ordnance Survey' …
>
> The printing function on the software allows maps to be printed to a range of scales. In relation to the maps in question, the software allowed maps to be printed to scales 1:10,000 to 1:1,000,000. I selected a scale that best fitted the claimed route on A4 paper but it was always 1:25,000 or larger. I then printed the maps on a laser printer …
>
> The maps which were produced are, indeed, to a scale of at least 1:25,000, that is to say … a measurement of 1 centimetre on the printed map corresponds to a measurement of 250 metres or less on the ground."

8. For more than four years after the applications were filed with Dorset County Council, no point was taken as to compliance with the statutory requirements relating to the maps – or, indeed, as to anything else. However, in October 2010 all five applications were rejected by the Council. Its reasoning was:

> "The applications in question were accompanied by computer-generated enlargements of Ordnance Survey maps and not by maps drawn to a scale of not less than 1 : 25,000 ..."

In other words, it did not accept that a map which had originally been drawn to a scale of 1:50,000 but then enlarged by a computer programme to a scale of 1:25,000 was a map which was, at the time of its submission, drawn to a scale of not less than 1:25,000.

9. The Trail Riders' Fellowship and [redacted] challenged this decision by way of an application for judicial review but on 2 October 2012 the application was dismissed by Supperstone J : [2012] EWHC 2634 (Admin). In essence, he agreed with the Council's interpretation, found non-compliance by the applicants and rejected an alternative ground of challenge based on the *de minimis* principle.

Discussion

10. It is important to keep in mind what paragraph 1(a) of Schedule 14 does and does not require. It is beyond dispute that it requires (1) something that is identifiable as "a map", which (2) is drawn to a scale of not less than 1:25,000, and which (3) shows the way or ways to which the application relates. Although the first of these requirements necessitates a map, it does not necessitate an Ordnance Survey map. It could have done. Such a statutory requirement is not unknown. For example, section 1(3) of the Commons Act 1899 refers to a "plan", adding that "for this purpose an ordnance survey map shall, if possible, be used". More recently, regulation 5 of the Petroleum (Production) (Landward Areas) Regulations 1995, which is concerned with licence applications, requires an application to be accompanied by two "copies of an Ordnance Survey map on a scale of 1:25,000 or such other map or chart as the Secretary of State may allow". The scheme with which we are concerned is not so specific. Nor is it prescriptive as to features which must be shown on the map, apart from the requirement that it "shows the way or ways to which the application relates". It is well-known that an original Ordnance Survey map with a scale of 1:25,000 depicts more physical features than an original Ordnance Survey map of the same site with a scale of 1:50,000. However, as paragraph 1(a) permits the use of a map which is not produced by Ordnance Survey (or any other commercial or public authority), it cannot be said to embrace a requirement that a map accompanying an application must include the same features as are depicted on an original 1:25,000 Ordnance Survey map. It may include more or fewer such features.

11. In my judgment, this tends to militate against the submissions made on behalf of the Council. To the extent that it is contended that "drawn to a scale of not less than 1:25,000" means "originally drawn to that scale, with the range of features normally depicted on an original Ordnance Survey map drawn to that scale", the submission seeks to read more into the text than its language permits. I can find nothing to support such a prescriptive requirement as to content as opposed to scale. The only prescriptive requirement as to content is that the map "shows the way or ways to which the application relates". This is a flexible requirement. Sometimes more detail will be necessary, sometimes less, depending on the way in question and its location.

12. The next question is whether the words "drawn to" a scale of not less than 1:25,000 mean that the map in question must have been originally drawn to that scale rather

than enlarged or reproduced to it. I can see no good reason for giving the requirement such a narrow construction. What is important is the scale on the document which accompanies the application. "Drawn" need not imply a reference to the original creation. It is more sensibly construed as being synonymous with "produced" or "reproduced". The Council does not suggest that only an original document will suffice. It accepts that a photocopy or a tracing of a 1:25,000 Ordnance Survey map would meet the requirement. However, no doubt mindful of the logic of his position, Mr George Laurence QC submits that an original 1:25,000 map which had been digitally enlarged to produce a 1:12,500 map would not meet the requirement. [redacted], whilst also seeking to uphold the construction of Supperstone J, dissociates himself from this aspect of Mr Laurence's analysis. I consider that he is right to do so. It points to the pedantry of the Council's position.

13. I reach this conclusion on the basis of conventional interpretation. However, it is fortified by an approach which takes account of technological change. At the time when the 1981 Act was enacted, Parliament would not have had in mind the kind of readily available technology which was used in this case. In *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, Lord Bingham said (at paragraph 9):

> "There is, I think, no inconsistency between the rule that statutory language retains the meaning it had when Parliament used it and the rule that a statute is always speaking ... The courts have frequently had to grapple with the question whether a modern invention or activity falls within old statutory language ... a revealing example is found in *Grant v Southwestern and County Properties Limited* [1975] Ch 185, where Walton J had to decide whether a tape recording falls within the expression 'document' in the Rules of the Supreme Court. Pointing out, at p190, that the furnishing of information had been treated as one of the main functions of a document, the judge concluded that a tape recording was a document."

Lord Bingham also referred to a the speech of Lord Wilberforce on *Royal College of Nursing v Department of Health and Social Security* [1981] AC 800 where he said (at page 822):

> "... when a new state of affairs, or a fresh set of facts bearing on policy comes into existence, the courts have to consider whether they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made."

Although the present case may be said to be more concerned with procedure than with policy, the same approach is appropriate, as it was in *Grant v Southwestern and County Properties* (above).

14. All this leads me to the view that, whilst I am confident that "drawn" was never intended to be construed as being confined to "originally drawn", it should also now be given a meaning which embraces later techniques for the production of maps. For

practical purposes, when a computer is used to translate stored data into a printed map, it can properly be said that the computer and the printer are, upon human command, "drawing" the map which emerges to the scale which has been selected. I find no difficulty in this approach in circumstances in which the requirements do not prescribe that the submitted map depicts the features which are depicted on an original 1:25,000 Ordnance Survey map.

15. It is submitted on behalf of the Council that its task as the surveying authority is made more difficult by the use of a map which, although it is to the scale of 1:25,000, does not depict all the features of an original 1:25,000 Ordnance Survey map. For example, the absence of such features may make it difficult to determine which of two adjacent landowners is "the owner or occupier of the land to which the application relates" for the purpose of service of a notice pursuant to paragraph 2(1) of Schedule 14. However, service of such a notice is an obligation of the applicant, not of the surveying authority and, in any event, there is a statutory alternative where it is not practicable, after reasonable inquiry, to ascertain the owner: paragraph 2(2). Ultimately, it is for the surveying authority "to investigate the matters stated in the application": paragraph 3(1)(a). In some cases such an investigation may be easier with the benefit of a map such as an original 1:25,000 Ordnance Survey map but that does not mean that the map accompanying the application must take that form in the absence of clear prescription. Parliament has laid down minimum requirements for the map which accompanies an application. The application triggers an investigation. If the investigation results in a modification of the definitive map, the surveying authority may conclude that the definitive map can only convey the requisite clarity if, say, an original Ordnance Survey 1:25,000 map is used in order to include features not shown on an original 1:50,000 map. It does not follow that such a map was required at the application stage. Moreover, at the modification stage, if further clarity is considered necessary, it may be secured by the statement which may be part of "the definitive map and statement": section 53(1). I am unconvinced by the protestations of inconvenience advanced on behalf of the Council. They do not assist with the task of interpretation.

Conclusion

16. For all these reasons, I conclude that a map which is produced to a scale of 1:25,000, even if it is digitally derived from an original map with a scale of 1:50,000, satisfies the requirements of paragraph 1(a) of Schedule 14 provided that it is indeed "a map" and that it shows the way or ways to which the application relates. I would therefore allow this appeal. There was originally a second ground of appeal which sought to rely on the *de minimis* principle. Sullivan LJ refused permission to appeal on that ground, observing that if the appeal were to succeed on the first ground, the second ground is unnecessary; and that, if the appeal were to fail on the first ground, the non-compliance with paragraph 1(a) "could not sensibly be described as *de minimis*". I respectfully agree. Although we have received submissions in support of a renewed application for permission in relation to the second ground, I would refuse permission.

Lady Justice Black:

17. I agree.

Lady Justice Rafferty:

18. I also agree.

Annex 2

Margaret Stevenson

From: [redacted]@supremecourt.uk>
Sent: 05 November 2019 10:42
To: [redacted]
Cc: UKSC Registry
Subject: r (app trail riders v dorset cc

Follow Up Flag: Flag for follow up
Flag Status: Completed

Lord Carnwath has directed me to write to the parties as follows:

"The court sees no reason to vary the terms of the order which was agreed between the parties, and reflected the form of the relief sought in the original claim. Had the council wished to challenge the validity of these applications on other grounds within schedule 14 para 1, they should have done so expressly in these proceedings or reserved their position. That not having been done, it is too late to raise such issues at this stage."

Kind regards, and thanks for your patience!

[redacted]
Deputy Registrar of the Supreme Court of the United Kingdom and Costs Clerk in the Judicial Committee of the Privy Council
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Appendix 8

Planning Inspectorate decision 31 July 2020

The Planning Inspectorate

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Brain Chase Coles Solicitors
Haymarket House, 20/24 Wote Street
Basingstoke
Hampshire
RG21 7NL

Your Ref:

Our Ref: FPS/C1245/14A/10

Date: 31 JUL 2020

Dear Madam

WILDLIFE AND COUNTRYSIDE ACT 1981 S14 S14
Dorset County Council
Refusal to upgrade Bridleway 14, Beaminster, to a Byway Open to all Traffic

I enclose for your information a copy of the Inspector's decision on this Appeal.

Also enclosed are two leaflets entitled *Our Complaints Procedure* and *Challenging the Decision in the High Court*.

Please note that this decision can only be challenged by applying to the Administrative Court for a judicial review.

If you have any queries about the enclosed decision, please contact the Quality Assurance Unit at the following address:

Customer Quality
The Planning Inspectorate
3D Kite
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Tel: 0303 444 5884
https://www.gov.uk/government/organisations/planning-inspectorate/about/complaints-procedure

An electronic version of the decision will shortly appear on the Inspectorate's website.

Yours faithfully
www.gov.uk

[redacted]
(Rights of Way Section)

APPdesp

The Planning Inspectorate

Appeal Decision

by Mark Yates BA(Hons) MIPROW

an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs

Decision date: 31 July 2020

Appeal Ref: FPS/C1245/14A/10

- This appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 ("the 1981 Act") against the decision of the Dorset Council ("the Council") not to make an order under Section 53(2) of that Act.
- The application was dated 21 December 2004 and this appeal relates to the Council's decision of 26 March 2019 to not make an order.
- The appellant claims that Beaminster Bridleway No. 14 should be upgraded to a byway open to all traffic ("BOAT").

Summary of Decision: The appeal is dismissed.

Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the 1981 Act.

2. I have not visited the site but I am satisfied that I can make my decision without the need to do so.

3. Submissions have been received from the appellant, the Council, affected landowners and other interested parties regarding this appeal. References below to 'the landowners' relate to the representations made on behalf of Mr and Mrs Clunes.

4. The alleged BOAT ("the claimed route") is shown on the map attached to this decision between points A, B, C, D and E. It links at point A with the C102 county road and at point E with BOAT 89. The definitive map was modified in 2001, following a public inquiry held to determine the status of the route that became BOAT 89.

Main Issues

5. Section 53(3)(c)(ii) of the 1981 Act specifies that an order should be made following the discovery of evidence which, when considered with all other relevant evidence, shows that *"a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description"*. The evidential test to be applied is the balance of probabilities.

6. The case in support relies on various historical documents and maps. I shall consider whether the evidence provided is sufficient to infer the dedication of higher public rights over the claimed route at some point in the past. Section

32 of the Highways Act 1980 requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as appropriate, before determining whether or not a way has been dedicated as a highway.

7. The Natural Environment and Rural Communities Act 2006 ("the 2006 Act") has the effect of extinguishing unrecorded public rights of way for mechanically propelled vehicles unless one or more of the exemptions in Section 67(2) or (3) of the Act is applicable. In this case, reliance is placed on the exemption in Section 67(3)(a) of the 2006 Act, namely that prior to the relevant date[1] an application was made for an order to modify the definitive map and statement to show the route as a BOAT.

Reasons

Consideration of the documentary evidence

8. The comments of the Council's Senior Archaeologist point to the claimed route being potentially of medieval origin. In respect of the representation from Mr Legg, I share the landowners concern in terms of the lack of evidence provided by him in support of his assertions regarding the historical use of the claimed route.

9. Two commercial maps produced by Taylor in 1765 and 1796 show a feature that could correspond to the claimed route. This is shown linking with a route at possibility point C or point E. No through route is visible to the south, beyond the land shown as a common. It can only be said that these maps could potentially provide support for the claimed route being a highway.

10. A circa 1800 sketch plan of roads in the neighbourhood of Beaminster is not particularly clear. It appears to depict other routes running north to south in this locality but not the claimed route. The provenance of this plan is unclear which lessens the weight that can be attached to it. However, I do not find that this plan provides support for the claimed route being viewed as one of the roads in Beaminster.

11. The map in connection with the Beaminster Inclosure Award of 1809 shows a route leading north eastwards to the edge of the land to be enclosed. This route is shown open-ended at its north-eastern end and annotated "*Meerhay*". It is described in the award as a public carriage road and highway with a width of 20 feet going to a place called Meerhay. The annotation on the map lies at the edge of the land to be enclosed and would have been located at a point to the south of the southern end of BOAT 89.

12. The landowners say that unless specific provision was made in the 1804 local Act, the general clauses contained in the Inclosure Consolidation Act 1801 ("the 1801 Act") would prevail. No provision is stated to have been made to vary Section 8 of the 1801 Act whereby public carriageways were to have a width of at least 30 feet. It is submitted that the provision in the award of a 20 feet wide carriage road was ultra vires. However, this does not prevent a finding that the way involved was dedicated at some other point in time. Moreover, this way lies to the south of the claimed route and the connecting BOAT 89.

[1] 20 January 2005

13. The Inclosure Commissioner was clearly of the view that a road continued beyond the land to be enclosed. No definitive view can be reached regarding the point where the road was considered to terminate in Meerhay. However, I find the submission of the landowners that the road would have terminated in the locality of the former manor house to be more persuasive than the appellant's view that it continued further northwards and encompassed the claimed route. The map evidence suggests that the settlement of Meerhay was concentrated in the locality of the manor house. Accordingly, there is real doubt regarding whether the road to Meerhay included any part of the claimed route.

14. The claimed route is shown by means of solid lines on the Ordnance Survey ("OS") map of 1811. OS maps assist in identifying the physical features present when the land was surveyed, but they provide no confirmation regarding the status of the roads or tracks shown. Nonetheless, the claimed route is shown as a through route between recognised highways.

15. The claimed route is shown as a cross road on the 1826 Greenwood map. This would generally be reflective of the existence of a highway running between two roads. However, the landowners draw attention to some private roads shown on the Greenwood map in the same way. This suggests the surveyor was concerned with the representation of all roads irrespective of their status. The fact that the claimed route is shown as a through route is suggestive of it being a highway rather than a private road but there is the potential for this to be indicative of bridleway status.

16. An 1843 tithe map shows the majority of the claimed route excluded from the taxable parcels of land. However, a section of the route around point C is shown within plot 844. The whole of the claimed route is shown coloured sienna and the Council says this colouring was used on the map in connection with other public routes. In contrast, the landowners draw attention to there being private routes marked in this way.

17. Highways were incidental to the tithe process and this will usually serve to limit the evidential weight of tithe maps. The exclusion of a route from the tithed parcels of land could be indicative of a public or private road as both would have impacted upon the productivity of the land being assessed. In this case, a section of the route falls within one of the tithed parcels of land. The depiction of the claimed route as a through route and the colouring used on the tithe map could again provide some support for it being a highway. However, there is the potential for this to be indicative of a bridleway.

18. OS mapping from the late nineteenth century and early part of the twentieth century shows the claimed route by a mixture of solid and pecked lines, which indicates that there were sections where it was unenclosed and others where it was enclosed on one or both sides. There are additional cycling and touring maps that appear to record the physical existence of the claimed route during the early part of the twentieth century.

19. The initials "*B.R.*" appear on the OS maps in relation to the claimed route to denote a bridle road. I accept that this does not necessarily mean the route was a bridleway. It is likely to have reflected how it appeared to the surveyor and represented the physical nature of the claimed route or sections of it. In terms of the footbridge identified on the 1903 OS map near to the southern end of BOAT 89, it cannot be determined what features previously existed at

this point. Nor does the absence of any reference to the claimed route in the OS name book mean that it was not a public road.

20. Attention has been drawn to locations where solid lines shown across the route are indicative of the presence of gates. The number of potential gates in this case could have served to hinder or slow the passage of vehicular traffic. However, the presence of gates does not mean that a route was not a historical vehicular highway.

21. The exclusion of a route from the surrounding hereditaments on the maps produced in connection with the 1910 Finance Act can provide a good indication of highway status, most likely of a vehicular nature as footpaths and bridleways were usually dealt with by way of deductions in the accompanying field books. In this case, the majority of the claimed route is shown running through the hereditaments numbered 136 and 430. A deduction was claimed for "*public rights of way or user*" through the latter, but it is not possible to determine the way in question. The exclusion of only limited parts of the claimed route from the surrounding hereditaments means that this document provides little, if any, support for the route being a vehicular highway.

22. The fact that the claimed route was considered to be a bridleway when the original definitive map was compiled does not impact on any unrecorded higher public rights that may exist over it. A subsequent letter of 22 May 1973 from the clerk of Beaminster Parish Council outlines that they were having difficulty in obtaining the required evidence in support of the upgrade of the claimed route. The reference to use appears to relate to access in connection with properties that adjoin the route. It was requested that the county council adopt the claimed route. This letter provides no actual evidence of use by the public and seems to be concerned with the maintenance of the route.

23. The reservation of rights of access, private maintenance undertaken on the route during the twentieth century and an obligation on tenants to not allow additional paths to be dedicated also do not assist in determining whether the claimed route was a pre-existing vehicular highway.

Conclusions on the evidence

24. There is some historical map evidence that shows the claimed route as a thorough route between recognised highways. The connecting BOAT 89 also connects with the D11228 road, which means that it is not a vehicular cul de sac at its northern end. The depiction of the claimed route as a through route provides some support for it historically being part of the public road network but only limited weight can be given to this map evidence. It could also potentially be reflective of the route's current status.

25. The reference to the road continuing to Meerhay in the inclosure documents does not necessarily indicate that it continued over the claimed route. I have found there to be merit in the view that the road terminated in the locality of the former manor house. The Finance Act evidence does not provide support for the majority of the claimed route being a vehicular highway.

26. Overall, I do not find that the different pieces of documentary evidence, when considered together, show on the balance of probabilities that this bridleway ought to be recorded as a BOAT.

The 2006 Act

27. In light of my conclusion above, I do not need to decide whether the relevant exemption in the 2006 Act is applicable. However, due to the extensive submissions made on this matter, I briefly address it below.

28. The former Dorset County Council previously turned down five applications, including this one, on the ground that the map with the applications did not comply with paragraph 1(a) of Schedule 14. This matter is relevant for the purpose of determining whether the exemption contained in Section 67(3)(a) of the 2006 Act was engaged.

29. The appellant successfully challenged the decisions in the Court of Appeal and this appeal was upheld by the Supreme Court. The Supreme Court declared that the applications were compliant with paragraph 1 of Schedule 14 of the 1981 Act. Attempts to have this declaration varied have been unsuccessful. On this issue, it is asserted that it should have related solely to paragraph 1(a) of Schedule 14. A decision would then need to be made regarding whether the application was compliant in respect of the provision of evidence in accordance with paragraph 1(b) of Schedule 14.

30. The declaration clearly states that the application is compliant with paragraph 1 of Schedule 14, which is the matter to be decided in terms of the relevant exemption in the 2006 Act. Nonetheless, the information provided by the Council indicates that the application was received before the cut-off date and that all of the documents listed in the application form were supplied by the applicant. There may well be additional evidence that is later found to be relevant, but the Council does not consider that the applicant deliberately withheld any evidence.

31. From the written information provided it appears to me that the relevant exemption in the 2006 Act would have been applicable in this case.

Other Matters

32. A number of concerns have been raised regarding the impact of the claimed route being recorded as a BOAT in relation to issues such as safety, the environment, maintenance, congestion and the suitability of the route for vehicular traffic. However, none of these matters are relevant to the test that I need to apply, as set out in paragraph 5 above.

Overall Conclusion

33. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be dismissed.

Formal Decision

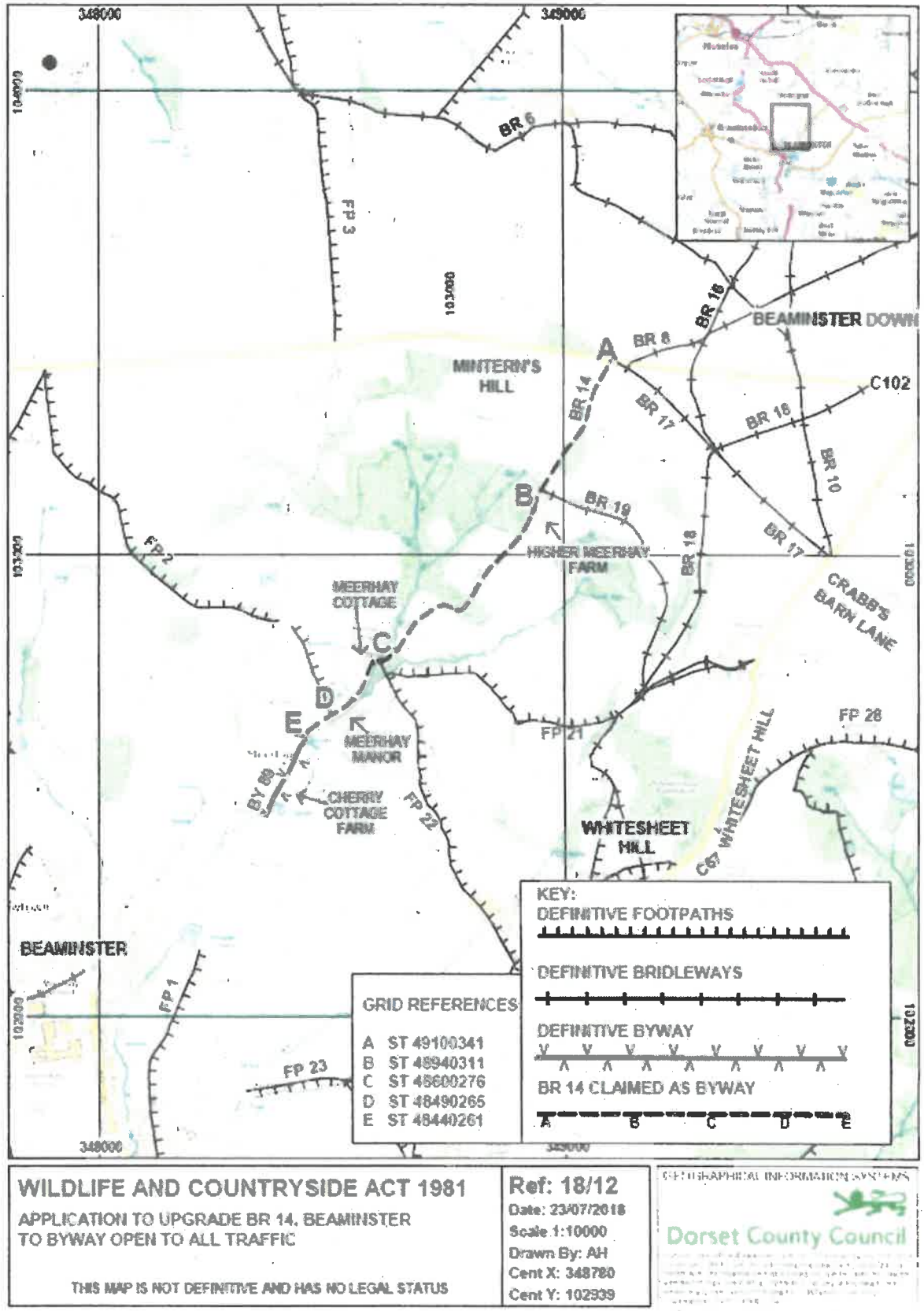
34. I dismiss the appeal.

Mark Yates

Inspector

APPENDIX 1

PLAN 18/12



The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Our Complaints Procedures

Complaints

We try hard to ensure that everyone involved in the rights of way process is satisfied with the service they receive from us. Applications and orders to amend the rights of way network can raise strong feelings and it is inevitable that someone will be disappointed with the decision. This can sometimes lead to a complaint, either about the decision itself or the way in which the case was handled.

Sometimes complaints arise due to misunderstandings about how the system for deciding application appeals and orders works. When this happens we will try to explain things as clearly as possible. Sometimes the objectors, applicant, the authority or another interested party may have difficulty accepting a decision simply because they disagree with it.

Although we cannot re-open a case to re-consider its merits or add to what the Inspector has said, we will answer any queries about the decision as fully as we can.

Sometimes a complaint is not one we can deal with (for example, complaints about how long an order making authority took to submit an order to the Secretary of State) in which case we will explain why and suggest who may be able to deal with the complaint instead.

How we investigate complaints

Inspectors have no further direct involvement in the case once their decision is issued and it is the job of our Customer Quality Team to investigate complaints about decisions or an Inspector's conduct. We appreciate that many of our customers will not be experts on the system for deciding rights of way appeals and orders and for some, it will be their one and only experience of it. We also realise that your opinions are important and may be strongly held.

We therefore do our best to ensure that all complaints are investigated quickly, thoroughly and impartially, and that we reply in clear, straightforward language, avoiding jargon and complicated legal terms.

When investigating a complaint we may need to ask the Inspector or other staff for comments. This helps us to gain as full a picture as possible so that we are better able to decide whether an error has been made. If this is likely to delay our full reply we will quickly let you know.

What we will do if we have made a mistake

Although we aim to give the best service possible, we know that there will unfortunately be times when things go wrong. If a mistake has been made we will write to you explaining what has happened and offer our apologies. The Inspector concerned will be told that the complaint has been upheld.

We also look to see if lessons can be learned from the mistake, such as whether our procedures can be improved upon. Training may also be given so that similar errors can be avoided in future. However, the law does not allow us to amend or change the decision.

Taking it further

If you are not satisfied with the way we have dealt with your complaint you can contact the Parliamentary Ombudsman, who can investigate complaints of maladministration against Government Departments or their Executive Agencies. If you decide to go to the Ombudsman you must do so through an MP. Again, the Ombudsman cannot change the decision.

Frequently asked questions

"Why can't the decision be reviewed if a mistake has happened?" – The law does not allow us to do this because a decision is a legal document that can only be reviewed following a successful High Court challenge.

"If you cannot change a decision, what is the point of complaining?" – We are keen to learn from our mistakes and try to make sure they do not happen again. Complaints are therefore one way of helping us improve.

"How can Inspectors know about local feeling or issues if they don't live in the area?" – Using Inspectors who do not live locally ensures that they have no personal interest in any local issues or any ties with the council or its policies. However, Inspectors will be aware of local views from the representations people have submitted.

"I wrote to you with my views, why didn't the Inspector mention this?" – Inspectors must give reasons for their decision and take into account all views submitted but it is not necessary to list every bit of evidence.

"How long will I have to wait for a reply to my complaint?" – We will aim to send a full reply within 20 working days. In some cases where the issues raised are complex, a more detailed investigation will be needed, often requiring the views of those involved with the case. This may mean that we cannot reply to you as quickly as we would like.

Further information

Each year we publish our Annual Report and Accounts, setting out details of our performance against the targets set for us by Ministers and how we have spent the funds the Government gives us for our work. We publish full statistics of the number of cases dealt with during the preceding year on our website, together with other useful information (see 'Contacting us').

Contacting us

Website
https://www.gov.uk/guidance/object-to-apublic-right-of-way-order

General Enquiries
Phone: 0303 444 5000
E-mail: enquiries@planninginspectorate.gov.uk

Complaints and Queries in England:

Please refer to our website:
https://www.gov.uk/government/organisations/planning-inspectorate/about/complaints-procedure or write to:

Customer Quality Unit
The Planning Inspectorate
3H Hawk
Temple Quay House
2 The Square
Temple Quay
Bristol BS1 6PN
Phone: 0303 444 5884

Cardiff Office
The Planning Inspectorate
Room 1-004
Cathays Park
Cardiff CF1 3NQ
Phone: 0292 082 3866
E-mail: Wales@planninginspectorate.gov.uk

Parliamentary and Health Service Ombudsman
Millbank Tower, Millbank
London SW1P 4QP

Complaints Helpline: 0345 015 4033
Website: www.ombudsman.org.uk

The Planning Inspectorate
Yr Arolygiaeth Gynllunio

Challenging a Decision in the High Court

Important Note - This leaflet is intended for guidance only. It should be noted that there are different procedures involved for statutory challenges and judicial reviews and they follow different timetables. Because High Court challenges can involve complicated legal proceedings, you may wish to consider taking legal advice from a qualified person such as a solicitor if you intend to proceed or are unsure about any of the guidance in this leaflet. Further information is available from the Administrative Court (see overleaf).

Challenging a decision

Once a decision is issued we have no power to amend or change it. Decisions are therefore final unless successfully challenged in the High Court. We can only reconsider a decision if a challenge is successful and the decision is returned to us for re-determination.

Grounds for challenging the decision

A decision cannot be challenged merely because someone disagrees with the Inspector's judgement. For a challenge to be successful, you would have to show that the Inspector had misinterpreted the law or that some relevant criteria had not been met. If, in relation to an order decision, a mistake has been made, and the Court considers it might have affected the decision, it will quash the decision and return the case to us for re-determination or it will quash the order completely. If the Court considers a mistake has been made on a Schedule 14 Appeal or Direction, it will quash the decision and return the case to us for re-determination.

Different order types

The Act under which the order decision has been **confirmed** will specify the conditions under which it can be challenged, and is thus a statutory right to challenge a confirmed order - often referred to as a Part 8 claim as it is brought under Part 8 of the Civil Procedure Rules 1998. There is no statutory right to challenge where an order is '**not confirmed**'; in these circumstances a judicial review under Part 54 of the Civil Procedure Rules 1998 of the decision not to confirm may be applied for. Both scenarios are set out in more detail below.

Challenges to confirmed orders made under the Wildlife and Countryside Act 1981

Any person aggrieved by the confirmed order can make an application to the High Court under paragraph 12 of Schedule 15 to the 1981 Act on the grounds i) that the order is not within the power of section 53 or 54; or ii) that any of the requirements of the Schedule have not be complied with. If the challenge is successful, the court will either quash the order or the decision. The Inspectorate will only be asked to re-determine the case if the decision only is quashed.

Challenges must be received by the Administrative Court within 42 days (6 weeks) of the date of publication of the notice of confirmation - this period cannot be extended.

Challenges to confirmed orders made under the Town and Country Planning Act 1990 and the Highways Act 1980

Any person aggrieved by the confirmed order can make an application to the High Court under paragraph 287, in the case of an order made under the 1990 Act, or paragraph 2 of Schedule 2 in the case of an order made under the 1980 Act, on the grounds that i) the order is not within the powers of the Act; or ii) that any of the requirements of the Act or regulations made under it have not been complied with. If the challenge is successful, the court will either quash the order or the decision. The Inspectorate will only be asked to re-determine the case if the decision only is quashed.

Challenges must be received by the Administrative Court within 42 days (6 weeks) of the date of publication of the notice of confirmation - this period cannot be extended.

Challenges to orders which are not confirmed and all Schedule 14 Appeal and Direction decisions

If an order made under any of the Acts is not confirmed, an aggrieved person can only challenge the decision by applying for a judicial review to the Administrative Court for a court order to quash the decision, the matter will then go back to the Inspectorate to re-determine. This also applies to an aggrieved person to a Schedule 14 Appeal or Direction decision as there is no statutory right to challenge.

For applications for judicial review, the Claim form must be filed with the Administrative Court promptly and in any event not later than 3 months after the date of the decision (for orders made under the Highways Act 1980 or the Wildlife and Countryside Act 1981) or 6 weeks (for orders made under the Town and Country Planning Act 1990), unless the Court extends this period.

Who should be named as Defendant in the claim form?

In order cases the Inspector is usually appointed on behalf of the Secretary of State for Environment, Food and Rural Affairs to confirm an order made by a local authority. In Schedule 14 appeal cases the Inspector is acting as the Secretary of State. The claim form for all types of proceedings should therefore be issued against the Secretary of State for Environment, Food and Rural Affairs and served upon: The Government Legal Department, One Kemble Street, London, WC2B 4TS. For telephone queries, please call the Government Legal Department on 020 7210 3000. Email: thetreasurysolicitor@governmentlegal.gov.uk

Interested parties

Interested parties can find out whether a case has been challenged by contacting the Administrative Court. If you do not know the name of the likely claimant, you will need to provide the Court with the date of the decision and the full title of the order or appeal (including the name of the relevant local authority). The more information you can provide, the easier it will be for the Court to identify it. If a person wants to become a formal party to the Court proceedings then they can make representations to the Court under Part 19 of the Civil Court Procedure Rules 1998 (see overleaf). Should you wish to become a formal party you may wish to seek legal assistance or ask the court for guidance. To be a party to a judicial review a person would have to have a sufficient interest.

Frequently asked questions

"Who can make a challenge?" – In principle, a person must have a sufficient interest (sometimes called standing) in the decision to be able to bring a challenge. This can include statutory objectors, applicants, interested parties as well as the relevant local authority.

"Who is notified of the challenge?" - In Part 8 statutory claims, the claimant will serve proceedings on the named defendants. In Judicial Review claims the claimant will serve proceedings on the persons the challenge is against and anyone else they have identified as an interested party. The Planning Inspectorate will not notify anyone of the challenge. The claimant would be expected to identify and include the Council as an interested party. If the defendant and any interested party are aware that another party should be made aware of the proceedings as an interested party they should include the details of that party in the acknowledgment of service.

"How much is it likely to cost me?" - A relatively small administrative charge is made by the Court for processing your challenge (the Administrative Court should be able to give you advice on current fees – see 'Further information'). The legal costs involved in preparing and presenting your case in Court can be considerable though. It is usual for the costs of a successful party to be paid by the losing party, therefore if the challenge fails you will usually be ordered to pay the defendant's costs as well as having to cover your own. If the challenge is successful, the defendant may be ordered to pay your reasonable legal costs. However, the court ultimately has the power to issue whatever costs it sees fit.

"How long will it take?" - This can vary considerably.

"Do I need to get legal advice?" - You do not have to be legally represented in Court but it is advisable to do so, as you may have to deal with complex points of law.

"Will a successful challenge reverse the order decision?" - Not necessarily. The Court will either quash the order or quash the decision. Where the decision is quashed, we will be required to re-determine the order. However, an Inspector may come to the same decision again, but for different or expanded reasons. Where the order is quashed, jurisdiction will pass back to the Order Making Authority. They will need to decide whether to make a new order.

"Will a successful challenge reverse the appeal decision?"
Yes. We will be required to re-determine the appeal. However, an Inspector may come to the same decision again, but for different or expanded reasons.

"If the decision is re-determined will it be by the same Inspector?"
The same Inspector will be used unless there is a good reason not to do so.

"What can I do if my challenge fails?" - The decision is final. Although it may be possible to take the case to the Court of Appeal, a compelling argument would have to be put to the Court for the judge to grant permission for you to do this.

"What happens if the order is quashed?" – Jurisdiction will pass back to the Order Making Authority. They will need to decide whether to make a new order.

"What can I do if I am not listed as an interested party on the challenge but want to be involved?" – You can contact the Administrative Court and ask to be listed as an interested party (see Part 54.1(2) of the Civil Procedure Rules 1998 for the definition of an interested party).

"Can the Planning Inspectorate or the Department for Environment, Food and Rural Affairs, provide me with advice about making a challenge?" – Neither the Planning Inspectorate nor the Department for Environment, Food and Rural Affairs can advise you on a challenge or on becoming a formal party – you should seek advice from your own legal adviser.

"Where will I find the claim forms?"
The forms are available on the Administrative Court's website at **www.justice.gov.uk/courts/procedurerules/civil/forms**.The Part 8 Claim form is number N208 and the form for making a Judicial Review is N461. Guidance notes for claimants are also available.

"Where do I send the completed claim forms?"
They need to be filed with the Administrative Court at The Royal Courts of Justice, Queen's Bench Division, Strand, London, WC2A 2LL. They also need to be served on The Government Legal Department, One Kemble Street, London, WC2B 4TS.

Further Information

Further advice about making a High Court challenge can be obtained from the Administrative Court at the Royal Courts of Justice, Queen's Bench Division, Strand, London WC2A 2LL, telephone 020 7947 6000. Information can also be found on their website at www.justice.gov.uk/courts/rcj-rolls-building/administrative-court. Please see the attached flow charts setting out the main steps to be followed for both the statutory and judicial review procedures (please note that these charts do not contain the specific timelines for submitting evidence).

Inspection of order documents

We normally keep most case files for one year after the decision is issued, after which they are destroyed. You can inspect order documents at our Bristol office, by contacting the case officer dealing with the case, or our General Enquiries number to make an appointment (see 'Contacting us'). We will then ensure that the file is obtained from our storage facility and is ready for you to view. Alternatively, if visiting Bristol would involve a long or difficult journey, it may be more convenient to arrange to view the documents at the offices of the relevant local authority.

CONTACT INFORMATION

The Planning Inspectorate

Rights of Way Section

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The Planning Inspectorate
3A Eagle Wing
Temple Quay House
2 The Square
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Bristol BS1 6PN

Phone: 0303 444 5466
E-mail: [redacted]@planninginspectorate.gov.uk
Information: https://www.gov.uk/guidance/object-to-a-public-right-of-way-order

General Enquiries
Phone: 0303 444 5000
E-mail: rightsofway2@planninginspectorate.gov.uk

Welsh Office
The Planning Inspectorate
Crown Buildings
Cathays Park
Cardiff CF10 3NQ
Phone: 0292 082 3866
E-mail: Wales@planninginspectorate.gov.uk

Complaints
Please refer to our website: https://www.gov.uk/government/organisations/planning-inspectorate/about/complaints-procedure Phone: 0303 444 5884

The Government Legal Department

102 Petty France
Westminster
London
SW1H 9GL
Phone: 020 7210 3000 Website:
https://www.gov.uk/government/organisations/governmentlegal-department

Administrative Court

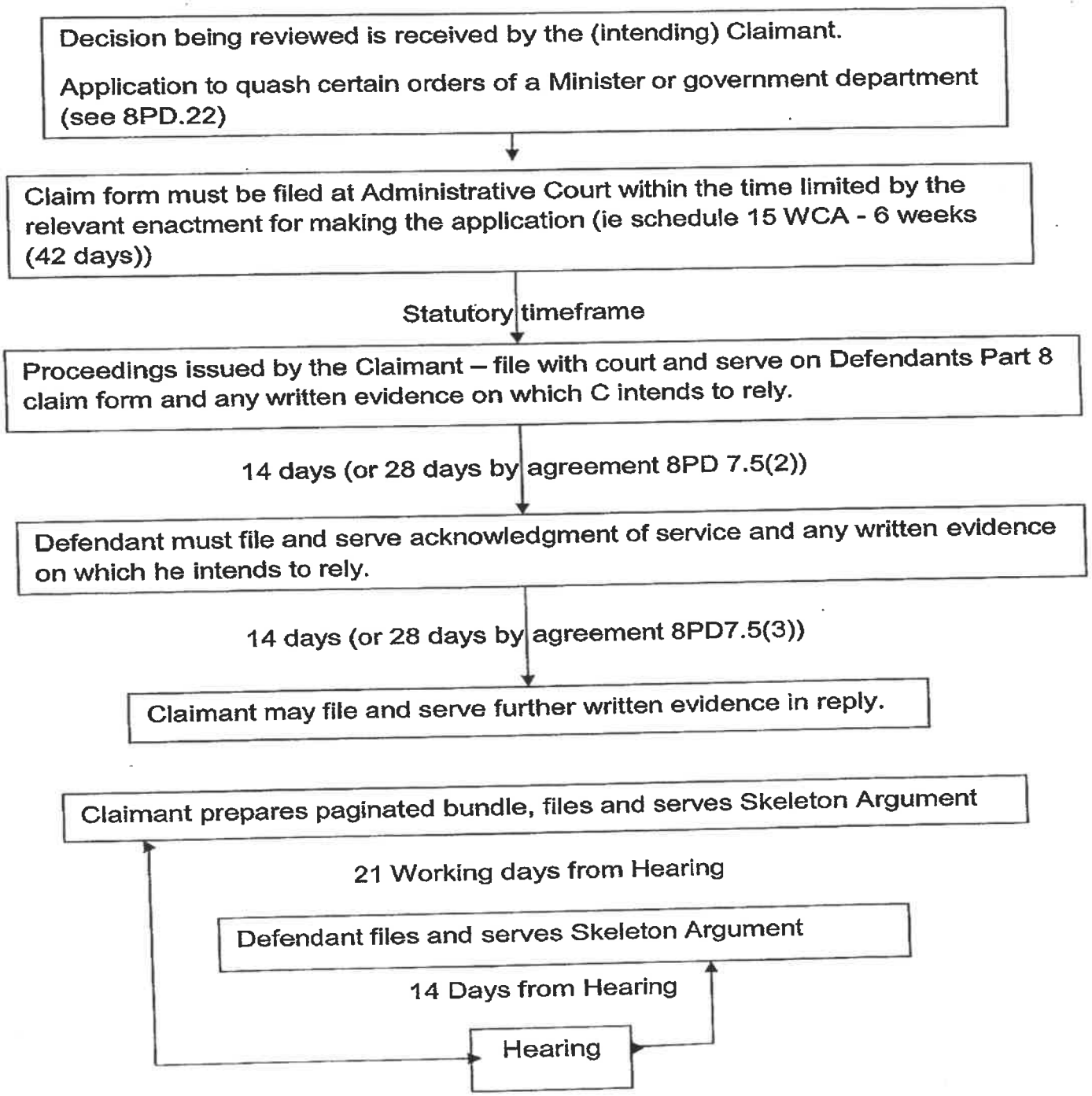
Royal Courts of Justice
Queen's Bench Division
Strand
London
WC2A 2LL
Phone: 020 7947 6655
Website:
www.justice.gov.uk/courts/rcj-rollsbuilding/administrative-court Email for enquiries:
administrativecourtoffice.generaloffice@hmcts.x.gov.u

Parliamentary and Health Service Ombudsman

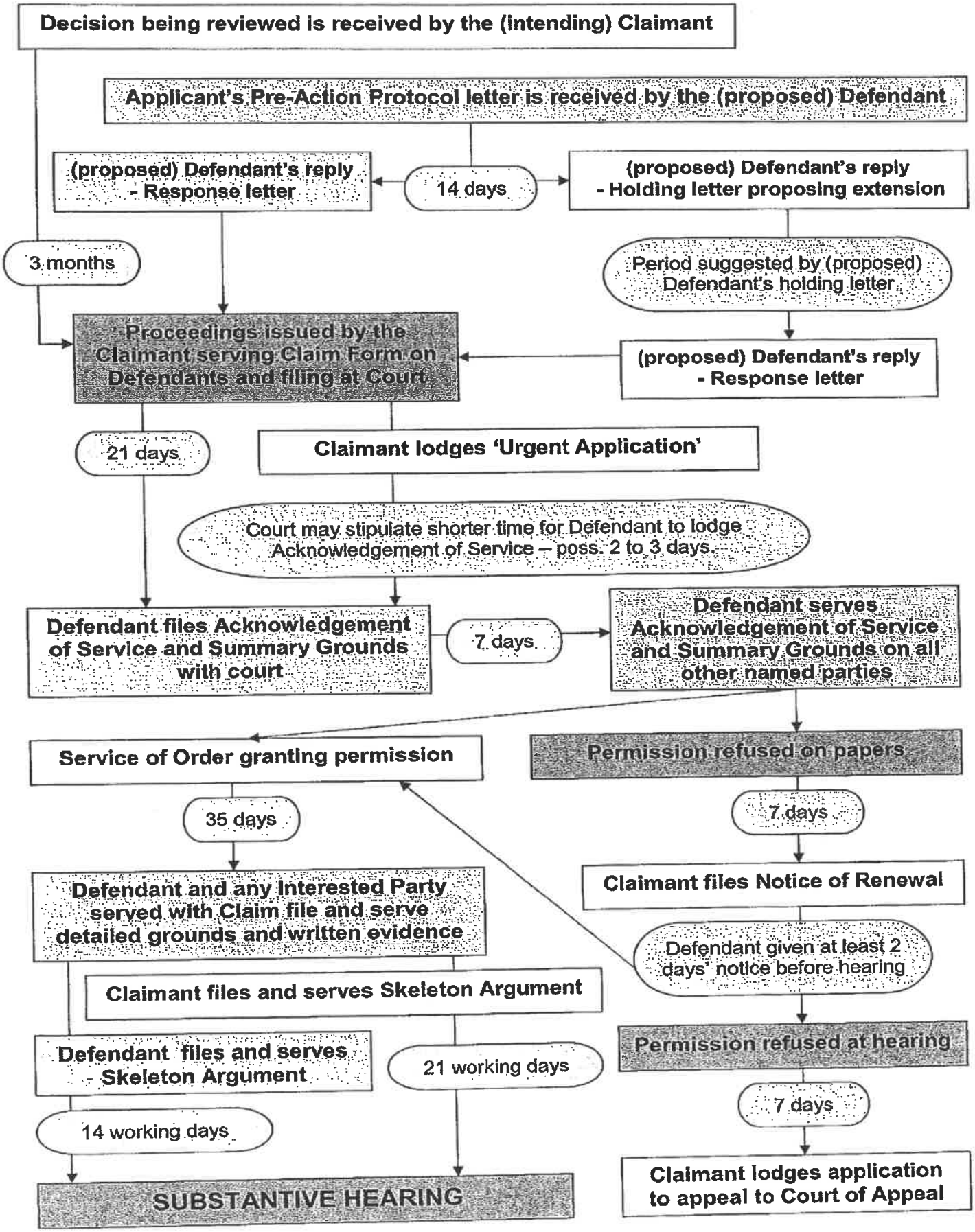
Parliamentary and health Service Ombudsman
Millbank Tower, Millbank
London SW1P 4QP

Complaints Helpline: 0345 015 4033
Website: www.ombudsman.org.uk

Timetable for Part 8 Claims



Timetable for Judicial Review



Appendix 9

Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] 1 WLR 1264

Court of Appeal

*Trevelyan v Secretary of State for the Environment, Transport and the Regions

[2001] EWCA Civ 266

2001 Jan 30; Feb 23

Lord Phillips of Worth Matravers MR, Simon Brown and Longmore LJJ

Highway—Right of way—Definitive map—Map showing bridleway—Landowner claiming right of way never existed and seeking deletion of bridleway from map—Power of inspector to confirm order for deletion—Whether evidence to justify inclusion of bridleway on map to be presumed—Standard of proof required to establish way marked on map by mistake—Wildlife and Countryside Act 1981 (c 69), s 53, Sch 15

Landowners across whose land a bridleway was shown on the definitive map applied to the county council under section 53(5) of the Wildlife and Countryside Act 1981[1] for deletion of part of the bridleway from the map on the ground that it had never been a right of way. The council considered that there was insufficient evidence of use by horse riders to justify its designation as a bridleway but sufficient evidence of use on foot for it to be included on the definitive map as a footpath and refused to make an order for deletion. The Secretary of State allowed an appeal by the landowners and directed the council to make an order deleting the relevant part of the bridleway from the map. The order was duly made but could not take effect until confirmed by the Secretary of State, who had to consider any objections or representations made. Objections having been made, the Secretary of State appointed an inspector to hold a local inquiry and decide whether the order should be confirmed with or without modifications. The inspector concluded that no right of way existed over the relevant part of the bridleway, and accordingly ordered its deletion with a minor modification. Further objections caused the holding of a further inquiry after which the inspector upheld his original decision. The judge dismissed an application by the applicant under paragraph 12 of Schedule 15 to the 1981 Act for the order to be quashed.

On appeal by the applicant—

Held, dismissing the appeal, (1) that, where, in the course of an inquiry to consider objections or representations concerning a proposed order to modify the definitive map under section 53 of the 1981 Act, facts came to light which persuaded the inspector that the definitive map should depart from the proposed order, it was open to him under Schedule 15 to the Act to make an order modifying the proposed order accordingly, subject to any consequent representations and objections; and that the inspector had therefore had power to confirm the order deleting part of a bridleway subject to a modification substituting a footpath (post, pp 1273B–C, 1278D).

(2) That, in considering whether a right of way marked on a definitive map did in fact exist, there was an initial presumption that it did and, in the absence of evidence to the contrary, it should be assumed that the proper procedures had been followed in compiling the map and thus that such evidence existed; that the standard of proof required to justify a finding that no right of way existed was no more than the balance of probabilities, but there had to be evidence of some substance to outweigh the initial presumption that the right of way existed; that the more time that elapsed the more difficult it would be to adduce positive evidence establishing that a right of way had been marked by mistake on the definitive map; and that, accordingly, since the

[1] Wildlife and Countryside Act 1981, s 53: see post, p 1268D–H.
Sch 15: see post, pp 1271H–1272C.

A inspector had correctly directed himself on the evidential effect of the definitive map and made a finding of fact which manifestly satisfied the test required to justify a finding that the bridleway in question had been marked on the map in error, he had been entitled to reach the decision that he did (post, pp 1276B–D, 1277D–E, 1278D).

Decision of Latham J affirmed.

The following cases are referred to in the judgment of Lord Phillips of Worth
B Matravers MR:

R v National Assembly for Wales, Ex p Robinson (2000) 80 P & CR 348
R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490, CA
R v Secretary of State for the Environment, Ex p Hood [1975] QB 891; [1975] 3 WLR 172; [1975] 3 All ER 243, CA
Rubinstein v Secretary of State for the Environment (1987) 57 P & CR 111

C

The following additional cases were cited in argument:

Morgan v Hertfordshire County Council (1965) 63 LGR 456, CA
Parry v Secretary of State for the Environment (unreported) 8 June 1998, Sedley J
R v Secretary of State for the Environment, Ex p Billson [1999] QB 374; [1998] 3 WLR 1240; [1998] 2 All ER 587
Tesco Stores Ltd v Secretary of State for the Environment [1995] 1 WLR 759; [1995]
D 2 All ER 636, HL(E)

APPEAL from Latham J

By a notice of appeal dated 12 April 2000 the applicant, John Trevelyan, suing on behalf of himself and all other members of the Ramblers Association, appealed with the leave of Laws LJ from the order of Latham J made on 24 January 2000 dismissing with costs his application
E dated 3 June 1999 for an order quashing the decision of the respondent, the Secretary of State for the Environment, Transport and the Regions, given by the inspector appointed by him for the purpose by letter dated 1 April 1999, whereby the Lancashire County Council (Definitive Map and Statement of Public Rights of Way) (Definitive Map Modification) (No 7) Order 1996 deleting part of bridleway no 8, Sawley, was confirmed. The grounds of
F appeal were: (1) in determining whether to make (or confirm) a definitive map modification order deleting a way from the definitive map pursuant to section 53(2)(b) and (3)(c)(iii) of the Wildlife and Countryside Act 1981 a surveying authority (or the Secretary of State or an inspector appointed by the Secretary of State) had to carry out an exercise in evaluating "relevant evidence". That evidence included the evidence for the existence of the way
G afforded by its original inclusion on the definitive map. The judge erred in law in his approach to the manner in which the Secretary of State's inspector carried out that exercise; (2) the approach which the judge ought to have adopted was (a) that the original inclusion of a way on the definitive map pursuant to section 27 of the National Parks and Access to the Countryside Act 1949 (the predecessor legislation to the 1981 Act) meant that the relevant surveying authority had to have been satisfied that a right of way as
H so shown subsisted, or at least was "reasonably alleged" to subsist, at the relevant date, and that accordingly there had to have been evidential material to support that allegation and to so satisfy the authority; (b) the onus was on the applicant for a definitive map modification order under section 53(2) and (3)(c)(iii) of the 1981 Act deleting the way to prove (if he

could) that there was not or could not have been such evidential material available at the time, and there was no onus on the objector to prove that there was such evidential material available at the time or what it was; (c) the mere absence at the time when the application to delete came to be considered of positive evidence of what evidential material was available at the time to support the allegation that the right of way subsisted at the relevant date did not rebut the inferences in (a) or warrant an inference that there was no or insufficient such material; (3) had the judge adopted that approach, he would have held that the decision under challenge could not stand because the inspector (a) failed to attach any weight at all to the fact of the original inclusion of the part of bridleway no 8 the subject of the modification order on the definitive map, the evidential significance of which inclusion was strengthened by the actions of Mr and Mrs Hindley and Mr Fernie (successively owners of the affected land during the definitive map preparation process) from which it was to be inferred (in the absence of evidence to the contrary, of which there was none before the inspector) that they too accepted the existence of a public right of way over it and had to have had evidential grounds for so doing, (b) did not ask himself whether the applicants for the order had discharged the onus of proving that there was or could have been no or no sufficient evidential material available at the time to support the allegation that at the relevant date bridleway rights (or rights on foot) subsisted over the part of bridleway no 8 or to entitle the surveying authority to conclude that allegation to be reasonably made, (c) did not find, and could not on the evidence before him have found, that the applicants for the order had discharged that onus, (d) none the less failed to consider the evidence against the background that there had been (albeit no longer available) additional evidential material for the existence of bridleway rights (or rights on foot) over the part of bridleway no 8 sufficient to satisfy the surveying authority that the allegation of their existence was reasonable, (e) wrongly left altogether out of account in evaluating the evidence for and against the existence of a public right of way over that part of bridleway no 8 (whether on foot and on horseback or on foot alone) the evidence for its existence afforded by its original inclusion on the definitive map and the inferences to be drawn from that coupled with the part played by the landowners in the definitive map preparation process; (4) the judge erred in law in adopting the approach that (a) no weight was to be given to the original inclusion of a way on the definitive map as evidence of its existence unless positive evidence was adduced of what evidential material was available at the time to support its inclusion and there was shown to have been significant probative material for that purpose, (b) there being no such positive evidence adduced before the inspector, the inspector was therefore entitled to give no weight to the inclusion of that part of bridleway no 8 on the definitive map (either of itself or coupled with the participation of the then owners of the affected land in the definitive map preparation process) as evidence of its status as a public highway, (c) the judge, like the inspector, thus mistakenly reversed the onus of proof; (5) the inspector's decision failed to explain or justify how the deletion claimed could stand with the retention of (i) the remainder of bridleway no 8 and/or (ii) footpaths 28 and 29; and the judge erred in law in failing to quash the decision on that additional basis.

A The facts are stated in the judgment of Lord Phillips of Worth Matravers MR.

George Laurence QC and *Rhodri Price Lewis* for the applicant.
John Hobson QC for the Secretary of State.

Cur adv vult

B

23 February. The following judgments were handed down.

LORD PHILLIPS OF WORTH MATRAVERS MR

1 This is an appeal from the Queen's Bench Division, Crown Office List against the judgment of Latham J.

2 Some 20 years ago, for the benefit of those who enjoy walking in the C countryside, the Lancashire County Council designated as a long distance footpath the Ribble Way, which follows the course of the river of that name. In so doing they followed rights of way depicted as such on the relevant definitive map. So long as a right of way is shown on that map, its existence is conclusively demonstrated. Legislation provides, however, a procedure that can lead to the deletion from a definitive map of rights of way that have D been marked on it in error. [redacted] live in [redacted] in the parish of Sawley and own the land around it. They bought their home in [redacted]. The Ribble Way passes through their land along bridleway 8. This proved unwelcome, for some who walked along this bridleway trespassed from it and committed acts of vandalism. [redacted] then discovered evidence which led them to conclude that bridleway 8 had been marked on the definitive map in error where there was, in fact, no right of way. In 1985 E they began the appropriate procedure to get deleted from the definitive map that part of bridleway 8 which crossed their land. I shall describe this part from now on simply as "bridleway 8", although in due course I shall have to address the fact that it did not include the easternmost section of bridleway 8. The procedure that [redacted] put in train followed a course more tortuous and lengthy than the Ribble Way, but culminated in an order made F by the respondent on 1 April 1999 deleting a large part of bridleway 8 from the definitive map. Mr Trevelyan, the appellant, was until recently the deputy director of the Ramblers Association. He appealed to Latham J to have the respondent's order quashed. That appeal failed. He now appeals to us with the permission of Laws LJ, who rightly took the view that the case raises a point of principle as to the correct approach to be adopted when G considering whether a right of way should be deleted from the definitive map.

The facts

3 I shall adapt the clear statement of the relevant facts and statutory provisions set out by Latham J in his judgment, for these are not contentious.

4 The definitive map in question was published on 10 August 1973. It H was prepared pursuant to the provisions of the National Parks and Access to Countryside Act 1949. Section 27 required the relevant authority, in this case Lancashire County Council, to survey land over which a right of way was alleged to subsist and to prepare a map showing such a right of way whenever in its opinion such a right of way subsisted, or was reasonably

alleged to have subsisted, at the relevant date. For the purposes of the present case, the relevant date was 22 September 1952. In order to carry out this duty, section 28 required the county council to consult with rural district councils. Section 29 then required a draft map to be prepared and advertised, and made provision for objections and determination by the county council of such objections. In the light of such objections, the county council was empowered to modify the map. A right was then given by section 29(5) for objections to any such modification to be dealt with by way of appeal to the Secretary of State, who was, in turn, empowered to hold a local inquiry under section 29(6). At the completion of that process, section 30 provided for the preparation of a provisional map; and section 31 entitled any person aggrieved to appeal to quarter sessions. By section 32, the county council was then obliged to prepare the definitive map. By section 32(4), designation of a right of way on such a map was deemed to be conclusive evidence that there was at the relevant date the right of way so designated. Section 33 required the county council to keep the definitive map under review, and provided for amendment by way of addition or modification but not deletion.

5 The relevant authorities were first given power to delete a right of way in limited circumstances by Schedule 3 to the Countryside Act 1968. The power to delete with which this appeal is concerned was however given by section 53 of the Wildlife and Countryside Act 1981, which provides:

> "(2) As regards every definitive map and statement, the surveying authority shall—(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
>
> "(3) The events referred to in subsection (2) are as follows . . . (c) the discovery by the authority of evidence which (when considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification . . .
>
> "(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of application under this subsection."

A 6 Schedules 14 and 15 to the 1981 Act make complicated provision for the procedures to be adopted in the event of any issues arising under section 53. By Schedule 14, an authority to whom any application is made for an order under section 53 is to investigate the matter and come to a determination. If the authority decides not to make an order, the applicant may appeal to the Secretary of State, who is to give such directions as appear
B to him necessary in the light of his decision on the appeal. By Schedule 15, where an authority has made an order, but there are objections, the order is to be submitted to the Secretary of State, who may appoint an inspector to hold an inquiry and to determine whether or not to confirm the order. In circumstances which I shall consider in greater detail in due course, it is open to the inspector to confirm an order with modifications. If the order is confirmed, but with modifications, and there are objections to the
C modifications, the Secretary of State is again required to hold a local inquiry or give the objectors an opportunity to be heard by an inspector before coming to a final decision. Paragraph 12 of the Schedule entitles any person aggrieved by the confirmation of an order on the grounds that it is outside the powers of section 53 or 54 to appeal to the High Court. This is the jurisdiction invoked in the present proceedings.

D 7 The right of way in question was not delineated on any maps before the coming into force of the 1949 Act. The survey of the relevant area for the purposes of that Act was carried out by [redacted] who was the Sawley parish representative on the Bowland Rural District Council, which was responsible for the survey on behalf of the Lancashire County Council. This was done between December 1950 and February 1951. Information
E supplied by [redacted] led the Bowland Rural District Council to record a right of way for those on foot or horseback running from the public highway in Sawley, along the drive leading to Sawley Lodge, and then across open fields, generally following the line of the River Ribble, through woods, eventually returning to the public highway. Its length was approximately three miles. It was identified on the definitive map as bridleway 8. The survey form delineating the route of the right of way did not include any
F explanation as to the nature of the evidence supporting the claim.

8 The land over which it ran had originally formed part of the Sawley Estate, which had, until 1949, been owned by [redacted] After his death it was split up. The land over which the western half of the claimed bridleway passed was purchased in August 1950 by [redacted]. When, as a result of the survey, the county council produced the draft
G definitive map in 1953, including bridleway 8, [redacted] objected to the map on two grounds. First they objected to the alignment of bridleway 8, on the grounds that it should have been shown running closer to the river; second, they objected to the inclusion of part of another bridleway, bridleway 20. These objections were accepted by the county council; and, eventually, the requisite amendments were duly recorded in 1965 in the notice given by the county council of proposed modifications to
H the draft definitive map.

9 In 1967 [redacted] bought [redacted], and in 1970 [redacted] bought the remainder of the land which had been owned by [redacted] across which part of the claimed bridleway ran. In July 1970 the provisional map was published, retaining the modification to

bridleway 8 to which I have already referred. [redacted] applied to quarter sessions under section 31(1) of the 1949 Act on the grounds that there was no public right of way along part of bridleway 8, and another bridleway, no 16. He also applied on the same grounds in relation to parts of two footpaths, numbered 11 and 17. He withdrew his objection in relation to bridleways 8 and 16; and the county council accepted that there was no right of way over the relevant parts of the two footpaths, which were deleted. The definitive map was accordingly published on 10 August 1973, including bridleway 8.

10 In 1976 [redacted] sold the land to [redacted]. The latter became concerned about the bridleway when it was included on the first Ordnance Survey map published after the definitive map, in 1979. The use of the bridleway increased, with instances of trespass and vandalism. They complained to the county council in 1980. The county council, however, had in mind their plan for the Ribble Way, which, it was proposed, should include bridleway 8. It was concerned that walkers would be put at risk by the use of the bridleway by horse riders, and suggested that the right of way be downgraded to a footpath. Mr and Mrs Lord were not prepared to agree. None the less, they reluctantly accepted the positioning of Ribble Way signs along bridleway 8, on the understanding that that would be entirely without prejudice to their contention that no public right of way of any description existed along the route.

11 In 1985 [redacted] applied to the Lancashire County Council under section 53(5) of the 1981 Act for an order deleting bridleway 8 from the definitive map on the grounds that it had never been a right of way. The county council considered that there was insufficient evidence of use by horse riders to justify its designation as a bridleway, but that there was sufficient evidence of use on foot to justify it being included on the definitive map as a footpath. The applicants appealed to the Secretary of State for the Environment. Before the appeal was considered, Taylor J in *Rubinstein v Secretary of State for the Environment* (1987) 57 P & CR 111 held that, because of the conclusive nature of inclusion of a right of way on the definitive map as at the relevant date, section 53(3)(c)(iii) could only involve consideration of evidence relating to matters after the relevant date, for example the physical destruction of the land over which the right of way was said to exist. The Secretary of State accordingly dismissed [redacted] appeal.

12 However, *Rubinstein's* case was overruled by the Court of Appeal in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354. The court held, in effect, that, if evidence came to light to show that a mistake had been made in drawing up the definitive map, then such a mistake could be corrected in either of the three ways envisaged in section 53(3)(c) of the 1981 Act. The objective of these provisions was to ensure that the definitive map provided as accurate a picture as possible of the relevant rights of way.

13 [redacted] were advised that they could submit a new application to delete bridleway 8, which they did. The county council, on considering the evidence, again concluded that a right of way existed, but that it was a right of way on foot and not on horseback. [redacted] exercised their right of appeal under Schedule 14 to the Secretary of State,

A who allowed the appeal on 21 December 1994 and directed the county council to make an order to delete bridleway 8 from the definitive map.

14 At this point complications ensued which it is unnecessary to recount. Suffice it to say that an order was made in due course by the county council which complied with the Secretary of State's direction. Under the relevant procedure, this order could not take effect until confirmed by the B Secretary of State. Before confirmation, the Secretary of State had to consider any representations or objections duly made in relation to it. Objections were made and the Secretary of State exercised his statutory power to appoint an inspector to hold a local inquiry into the matter. This had the effect of delegating to the inspector the task of deciding whether or not the order should be confirmed, with or without modifications.

15 Despite the decision of the Secretary of State, the county council C remained of the view that, while no bridleway existed, the evidence demonstrated that there was a right of way in the form of a footpath. Accordingly at the inquiry they urged the inspector to confirm the Secretary of State's order, subject to a modification that would replace the deleted bridleway with a footpath. The Ramblers Association objected to the order, contending that the bridleway was properly marked on the map and should D not be deleted or modified. Alternatively, they supported the modification proposed by the county council. The South Pennine Packhorse Trails Trust also objected to the order on the ground that it could not be demonstrated that there had been any error in depicting bridleway 8 on the definitive map.

16 The inspector, after a seven-day inquiry, gave his first decision on 18 December 1997. In this he concluded that there was no right of way of E any description along bridleway 8, save for a stretch from the public highway along Sawley Lodge Drive to the junction with another bridleway, bridleway 16. He therefore proposed to make the order with a modification so as to leave this short stretch of bridleway 8 on the map. This triggered the right to make further objections, which were considered at a further public inquiry, as a result of which the inspector upheld his original decision in a letter of 1 April 1999. Although the latter was the final order, against which F the appellant applied to Latham J, the relevant reasoning was contained in the original decision letter of 18 December 1997.

The options open to the inspector and the decision that he reached

17 The order challenged before the inspector directed that bridleway 8 should be deleted from the definitive map. It was undoubtedly open to the G inspector to confirm the order, or alternatively to decide that the order should not be confirmed. He was in doubt, however, as to whether it was open to him to accede to the submission of the county council that he should modify the order by substituting a footpath for bridleway 8.

18 The powers of the inspector were derived from Schedule 15 to the 1981 Act, which provides, in so far as relevant:

H

"*Opposed orders*

"7(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.

"(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either—(a) cause a local inquiry to be held; or . . .

"(3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.

"*Restriction on power to confirm orders with modifications*

"8(1) The Secretary of State shall not confirm an order with modifications so as—(a) to affect land not affected by the order; (b) not to show any way shown in the order or to show any way not so shown; or (c) to show as a highway of one description a way which is shown in the order as a highway of another description, except after complying with the requirements of sub-paragraph (2)."

19 Sub-paragraph (2) makes provision for representations and objections to the proposed modification and a further public inquiry to consider these.

20 The inspector, acting on behalf of the Secretary of State, was rightly satisfied that he could and should act pursuant to paragraph 8(1)(b) in confirming the order subject to a modification which left on the definitive map the portion of bridleway 8 which followed the course of [redacted] Drive. His doubts as to his power to make the modification proposed by the county council were expressed in the following passage of his decision letter:

"The county council were, nevertheless, seeking to modify the order to show the order path as a footpath to the north of the junction with bridleway 16. Their justification for this was that the Secretary of State's decision requiring the order to be made, with which they disagreed, was only part of the procedural process of Schedules 14 and 15 to the 1981 Act leading to the testing of all the available evidence both written and oral at a public inquiry. However, it does not seem to me that an order which, as written, quotes section 53(3)(c)(iii) and states 'that there is no public right of way over land shown in the map and statement as a highway of any description' and does not proceed with the alternative wording of the subsection can be modified to show a public right of way, other than for the retention of parts of bridleway 8. I regard this as fundamental in this case."

21 On behalf of Mr Trevelyan, Mr Laurence submitted that the inspector had erred in concluding that it was not open to him to confirm the order subject to a modification which substituted for bridleway 8 a footpath. He accepted that this could not be done under paragraph 8(1)(c) because there was no "way which is shown in the order" for which a footpath could be substituted. He argued, however, that the proposed modification fell within paragraph 8(1)(b) in that it showed a way not shown in the order.

22 For the Secretary of State, Mr Hobson supported the conclusion of the inspector. He argued that to depict a footpath in place of bridleway 8, when the order directed that the bridleway should be deleted, could not be

A described as *confirming* the order subject to modification. It was making a fundamentally different order.

23 If Mr Hobson's submission is correct, the consequence, as he accepted, was that, if the inspector had been satisfied that there was a right of way on foot along the course of bridleway 8, but that this was the limit of the right of way, he would have been bound to decide that the original order B should not be confirmed, leaving on the definitive map a bridleway that should not be there. This would be a manifestly unsatisfactory state of affairs. In my judgment, the scheme of the procedure under Schedule 15 is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry. To fetter his power to do this by a C test which requires evaluation of the modification to see whether the inspector can truly be said to be *confirming* the original order would be undesirable in principle and difficult in practice. Accordingly I consider that Mr Laurence was correct to challenge the decision of the inspector as to the ambit of his powers.

24 This might have been of some moment, for the inspector stated that D he regarded his conclusion as "fundamental in this case". It does not, however, appear to me that his conclusion had any effect on his decision. The inspector decided that the evidence was clearly inconsistent with the right of way depicted as bridleway 8 ever having existed as such. His decision letter then continued:

> "The question remains as to whether an error in recording a path as a E public bridleway, which, by definition, includes public footpath rights of way, reads across to those rights. I take the view that the error was in the recording of a right of way of whatever rights and consequently find myself persuaded that the provisions of section 53(3)(c)(iii) have been satisfied in relation to the order path apart from the very southernmost part between point A and the junction with bridleway 16."

F 25 It seems to me, and Mr Laurence did not gainsay this, that the inspector found in terms that it would be erroneous for the definitive map to portray a right of way of any kind along the course of what had been depicted as bridleway 8.

The reasons for the inspector's decision

G 26 The inspector received a substantial body of evidence as to the nature and extent of the user made of the path depicted as bridleway 8, both before and after 1952. There was no positive evidence that it had ever been used by horses, nor any clear evidence that such user would even have been a physical possibility. There was considerable evidence of its use as a footpath, but the evidence conflicted as to whether this was under license or in assertion of a public right of way. Latham J summarised this and other H evidence in his judgment. I do not find it necessary to repeat that exercise for this reason. Mr Laurence conceded that he could not contend that the inspector's decision was perverse. He accepted that there was evidence which might have supported the decision reached by the inspector even had he applied himself correctly to its consideration. Mr Laurence submitted,

however, that there were two errors of principle in the inspector's approach. But for those errors he might have reached a different decision. It followed that his decision should be quashed.

27 I propose now to consider in turn each of the alleged errors.

The effect of the definitive map

28 Under the scheme set out in the 1949 Act the depiction of a right of way on the definitive map was intended to establish conclusively, once and for all, the existence of that right of way. The Court of Appeal in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354 decided, however, that Parliament had had second thoughts. Mr Laurence has reserved the right to challenge that decision should he have the opportunity in the House of Lords. In this court he accepts, as he must, that the 1981 Act provides for the removal of rights of way from the definitive map if it is shown that they were depicted on it by mistake.

29 Mr Laurence submits that, although the definitive map is *to that extent* no longer conclusive as to the existence of a right of way, it is cogent evidence of the existence of any right of way shown on it. His primary challenge to the inspector's decision is that the inspector attached no weight at all to the fact that bridleway 8 had been entered on the definitive map when he should have treated this as highly material evidence of the existence of a right of way.

30 The inspector found that there was no reason to doubt that the proper statutory procedures were carried out in relation to the depiction of bridleway 8 on the definitive map. Mr Laurence showed us what those procedures must have involved.

31 They involved a parish survey of the relevant area by [redacted], a meeting of Sawley Parish Council, and the provision by [redacted] of details of rights of way, including bridleway 8, to the clerk to Bowland Rural District Council. The clerk signed a form on which the details of bridleway 8 that had been provided by [redacted] were set out. That form had a space for insertion of the reasons for believing that the bridleway was public, but nothing was entered in this space. The rural district council in its turn passed the information on to the West Riding County Council, which was then the surveying authority. The entry by the county council of bridleway 8 on the definitive map showed that they were satisfied, if not that it subsisted, at least that it was reasonably alleged to subsist. Thereafter, there were opportunities to challenge the draft map, but in so far as bridleway 8 was concerned such challenges as were made were subsequently compromised or abandoned. When the definitive map was finally published in August 1973, all involved anticipated that it would conclusively and permanently establish the existence as a right of way of bridleway 8. It was in the light of this history that Mr Laurence submitted that the very fact of the depiction of bridleway 8 on the definitive map should have carried very significant evidential weight with the inspector.

32 Latham J, at paragraph 23 of his judgment, accepted that the fact of the inclusion of the right of way on the definitive map was "obviously some evidence of its existence" but continued:

> "The fact of the inclusion of the right of way on the definitive map is obviously some evidence of its existence. But the weight to be given to

A that evidence will depend upon an assessment of the extent to which there is material to show that its inclusion was the result of inquiry, consultation, or the mere ipse dixit of the person drawing up the relevant part of the map. In the present case, there was nothing to suggest that any significant probative material existed at the time to support Mr Proctor's survey . . ."

B 33 Mr Laurence submitted that the judge's approach to the definitive map erred in principle. It was wrong to discount it simply because there was no evidence of the basis upon which bridleway 8 had been entered on it. It was of the nature of things that such evidence might be lost with the passage of time, in which event an assumption should be made that such evidence had none the less existed. Mr Laurence invoked a statement by Lord C Denning MR in *R v Secretary of State for the Environment, Ex p Hood* [1975] QB 891, 899–900: "The definitive map in 1952 was based on evidence then available, including, no doubt, the evidence of the oldest inhabitants then living. Such evidence might well have been lost or forgotten by 1975."

34 Latham J's decision in the present case was recently followed by Richards J in *R v National Assembly for Wales, Ex p Robinson* (2000) D 80 P & CR 348. He said, at p 356:

"The factual position in *Trevelyan* was materially identical to that in the present case. Mr Proctor's survey form delineating the route of the right of way did not include any explanation as to the nature of the evidence supporting the claim. That is equally true here. I have already E referred to the fact that the relevant section on the survey record card is blank. A passage at the end of paragraph 39 of the decision letter suggests that the National Assembly took the view that there could have been more evidence of public use at the time of inclusion of the footpath on the definitive map than exists now. Any such view would be pure speculation. There is nothing to show that reliance was placed at the time on anything beyond the mere existence of the footpath. That being so, no F weight could properly be attached to the mere fact that the footpath was included on the definitive map. By attaching weight to the fact of inclusion, the National Assembly fell into error."

35 Mr Laurence submitted that this passage compounded the error of approach of Latham J.

36 I consider that the approach of Latham and Richards JJ to the weight G to be given to the definitive map was, as Mr Laurence has submitted, wrong in principle. In the course of argument the court drew the attention of counsel to section 32 of the Highways Act 1980, which does not appear to have featured in discussion below. This provides:

"A court or other tribunal, before determining whether a way has or has not been dedicated as a highway, or the date on which such H dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for

which it was made or compiled, and the custody in which it has been kept and from which it is produced." A

37 Both counsel agreed that this provision was applicable by analogy to the weight to be attached to the definitive map in the context of the inspector's task of considering whether, having regard to all the available evidence, he was satisfied that the right of way depicted as bridleway 8 did not exist. B

38 Where the Secretary of State or an inspector appointed by him has to consider whether a right of way that is marked on a definitive map in fact exists, he must start with an initial presumption that it does. If there were no evidence which made it reasonably arguable that such a right of way existed, it should not have been marked on the map. In the absence of evidence to the contrary, it should be assumed that the proper procedures were followed and thus that such evidence existed. At the end of the day, when all the evidence has been considered, the standard of proof required to justify a finding that no right of way exists is no more than the balance of probabilities. But evidence of some substance must be put in the balance, if it is to outweigh the initial presumption that the right of way exists. Proof of a negative is seldom easy, and the more time that elapses, the more difficult will be the task of adducing the positive evidence that is necessary to establish that a right of way that has been marked on a definitive map has been marked there by mistake. C D

39 These considerations are reflected in guidance published by the Secretary of State for the Environment (Circular 18/90) and the Secretary of State for Wales (Circular 45/90) after the decision of the Court of Appeal in *R v Secretary of State for the Environment, Ex p Burrows* [1991] 2 QB 354: E

> "in making an application for an order to delete or downgrade a right of way, it will be for those who contend that there is no right of way or that a right of way is of a lower status than that shown, to prove that the map is in error by the discovery of evidence, which when considered with all other relevant evidence clearly shows that a mistake was made when the right of way was first recorded . . . Authorities will be aware of the need, as emphasised by the Court of Appeal, to maintain an authoritative map and statement of the highest attainable accuracy. The evidence needed to remove a public right from such an authoritative record, will need to be cogent. The procedures for identifying and recording public rights of way have, in successive legislation, been comprehensive and thorough. Whilst they do not preclude errors, particularly where recent research has uncovered previously unknown evidence, or where the review procedures have never been implemented, they would tend to suggest that it is unlikely that a large number of errors would have been perpetuated for up to 40 years, without being questioned earlier." F G

The inspector's approach

40 The approach of the inspector to the standard of proof appears from the following passages of his decision letter, which followed a detailed assessment of all the evidence: H

> "Looked at in the context of the evidence of the persons working on or for the estate or those holding exclusive rights such as the Yorkshire Fly

A Fishers' Club, a clear impression builds up of a situation in which it seems to me to be beyond the bounds of credibility to accept that a public right of way existed over the Sawley Estate to the north of the junction with the Dockber Road in the first half of the century. I agree that the evidence needed to remove a public right of way from the definitive map and statement needs to be clear and cogent and demonstrate that a mistake had been made in the original claim and recording. I have noted all the B representations and objections on the matter but I am not persuaded, on the balance of the evidence, that a public bridleway existed from the junction with bridleway 16, northwards to point N and the junction with footpath 18, on the line of the order route, or the route originally claimed, prior to 1952. I am, consequently, persuaded that a mistake was made during the Sawley parish survey and that the order path was recorded in C error as a public bridleway."

41 I would make the following comments in relation to these passages.

42 The statement "I am not persuaded, on the balance of the evidence, that a public bridleway existed" is unhappily worded. Taken in isolation, those words suggest that the inspector considered that he should confirm the order unless satisfied on balance of probabilities that there was a bridleway. D But it is not right to take those words in isolation. The inspector directed himself that clear and cogent evidence was necessary to remove a public right of way from the definitive map and that it had to be demonstrated that a mistake had been made. This was necessarily, albeit implicitly, a recognition of the evidential effect of the definitive map. The finding by the inspector that it was, on the evidence, "beyond the bounds of credibility to E accept that a public right of way existed" over the material portion of bridleway 8 was a finding of fact that, unless demonstrated to be perverse, manifestly satisfied the test required to justify a finding that the bridleway had been marked on the definitive map as a right of way in error. For these reasons, I would reject the first ground of challenge made by Mr Laurence to the decision letter.

F *Anomalies*

43 As an independent ground of challenge to the inspector's decision, Mr Laurence contended that he failed to take into account the fact that the order deleting bridleway 8 resulted in a number of anomalies on the definitive map. Two footpaths, numbers 28 and 29 linked with bridleway 8. The removal of the bridleway had the result that these ended in culs-de-sac. G Furthermore bridleway 8 continued for half a mile or so to the east of the land affected by the order. The result of the order was, so Mr Laurence contended, to end this section in a cul-de-sac.

44 The inspector referred to the fact that confirmation of the order would produce anomalies in relation to the two footpaths, but Mr Laurence submitted that this reference failed to accord to them their proper significance. The inspector should have given more detailed consideration to H whether the order could be reconciled with these anomalies. I do not agree. The inspector's reference demonstrates that he did apply his mind to the significance of the two footpaths. He clearly considered that they did not outweigh the import of the other evidence. It was open to him so to conclude.

45 Mr Laurence also complained that the inspector made no reference to the anomaly created by the isolated eastern section of bridleway 8. It is true that the inspector did not refer to this when dealing with anomalies. He had, however, given consideration to this section of the bridleway earlier in his decision letter. In the course of considering the significance of an early map, OS 1908/09, he commented that he found it particularly significant that the map showed a bridlepath on the line of the eastern section of bridleway 8 that crossed by a ford to the north side of the Ribble rather than continuing along the course of the disputed part of the bridleway. This was a matter that the inspector could properly weigh against any suggestion that there was no explanation for the eastern section of bridleway 8.

46 Latham J was not impressed by the argument based on anomalies. He pointed out that the eastern section of bridleway 8 did not fall within the area of the map that the inspector was required to consider. Had he considered the evidence in relation to it, he might have concluded that the eastern section of the bridleway had also been depicted in error. I share his conclusion that the fact that the order produced the anomalies identified by Mr Laurence does not invalidate the inspector's decision. I would dismiss this appeal.

SIMON BROWN LJ

47 I agree.

LONGMORE LJ

48 I also agree.

Appeal dismissed.
No order as to costs. Costs order below to stand.
Permission to appeal refused.

Solicitors: Brooke North, Leeds; Treasury Solicitor.

SLD

Appendix 10

Planning Inspectorate's Advice Note 20

Planning Inspectorate (https://www.gov.uk/government/organisations/planning-inspectorate)

Guidance

Rights of Way Section Advice Note No 20 - Inspectors' Power to Modify Definitive Map

Modification Orders

Updated 14 October 2021

Applies to England

This publication is available at https://www.gov.uk/government/publications/rights-of-way-advice-note-20-inspectors-powers-to-modify-modification-orders-made-under-the-wildlife-and countryside-act-1981/rights-of-way-section-advice-note-no-20-inspectors-power-to-modify-definitive-map-modification-orders

Contents

1. Introduction

1.1. This advice is for Inspectors dealing with orders made under s53(2) of the Wildlife and Countryside Act 1981 (the '**1981 Act**') where, in respect of an order, either: (i) no event has been specified, (ii) the wrong event has been specified, (iii) more than one event should have been specified but was not, (iv) more than one event has been specified, but one or more of them is redundant, or (v) the order is specified to have been made under section 53(2)(a) of the 1981 Act, when the reference should have been to section 53(2)(b), or vice versa. '**Event**' has the same meaning as in s53(3) of the 1981 Act.

1.2. This Advice Note is publicly available. It has no legal force and is not itself an authoritative interpretation of the law.

2. Background

2.1. All of the above scenarios have occurred in the past, prompting the need to consider what, if any, powers are available to Inspectors to modify such orders. The following advice sets out the Planning Inspectorate's view on each scenario.

3. General

3.1. Section 57(1) of the 1981 Act provides that: "An order under the foregoing provisions of this Part [which includes an order made under section 53(2) of the 1981 Act] shall be in such form as may be prescribed by regulations made by the Secretary of State ……".

3.2. Regulation 4 of the Wildlife and Countryside (Definitive Maps and Statements) Regulations 1993 (SI 1993/12; the '**Regulations**') provides that: "A modification order shall be in the form set out in Schedule 2 to these Regulations or in a form substantially to the like effect, with such insertions or omissions as are necessary in any particular case." "A form substantially to the like effect" is to be regarded in the

colloquial sense of “a substantially similar form”; i.e. the form must make clear the effect of the order and must also contain a statement of the event(s) giving rise to the order. Schedule 2 to the Regulations provides, amongst other things, for the following form of wording to be used when a modification order is made: “This Order is made by (name of surveying authority) under section ((53(2)(a)) (53(2)(b)….) of the [1981 Act] because it appears to that authority that the (insert title of (definitive) map and statement) require modification in consequence of the occurrence of an event specified in section 53(3) (specify the relevant paragraph and sub-paragraph), namely (specify event)…..”.

3.3. Before going on to consider the scenarios in paragraph 1.1 above, it is important to note the guidance set out in paragraph 10.12 of DEFRA Circular 1/09, which points out that substantive errors may result in the rejection of an order by the Secretary of State.

3.4. It should be borne in mind that a modification order is published to allow the public: (i) to consider the reasons for the order and the effect of the order, and (ii) to raise objections if they wish. The prescribed form of order ensures that the public has sufficient information to enable an informed decision to be made about whether or not to object to the order.

3.5. Thus, if an order contains an error that does not (i) prejudice the interests of any person, (ii) render the order misleading in its purpose, or (iii) appear to result in incorrect information being recorded on the definitive map (hereafter a ‘**minor**’ error), it may be corrected by modification. However, if the error is ‘substantive’, the correct approach is for the order to be rejected and returned to the relevant surveying authority with a written explanation as to why the order was rejected, together with a written recommendation that the surveying authority should notify all relevant parties of such rejection and of the reasons for such rejection.

3.6. Of course, paragraph 8(1) of Schedule 15 to the 1981 Act provides that the Secretary of State shall not confirm an order with modifications so as: (a) to affect land not affected by the order; (b) not to show any way shown in the order or to show any way not so shown; or (c) to show as a highway of one description a way which is shown in the order as a highway of another description, except after complying with the requirements of sub-paragraph (2). Paragraph 8(2) requires the Secretary of State to give such notice as appears to him

requisite of his proposal so to modify the order; there is then an opportunity (the minimum period being 28 days from the date of the first publication of the notice) for representations and objections to be made and, in certain circumstances, a local inquiry may be held. In such circumstances, there is clearly no question of a person's interests being prejudiced, of the order being misleading in its purposes, or of incorrect information being recorded on the definitive map.

3.7. As Lord Phillips made clear in Trevelyan v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 266 "the scheme of the procedure under Sch 15 to the 1981 Act is that if, in the course of the inquiry, facts come to light which persuade the inspector that the definitive map should depart from the proposed order, he should modify it accordingly, subject to any consequent representations and objections leading to a further inquiry." Of course, the facts which come to light may, subject to the relevant test(s) being fulfilled, require the relevant 'event' or 'events' to be modified on the order (e.g. an order may be made relying on the 'event' in section 53(3)(c)(ii) to "upgrade" a way, but during the course of the inquiry facts emerge which suggest that the line of the "upgraded" way differs from the line of the existing way, such that section 53(3)(c)(i) is also relevant). Where the required modification, which may or may not involve a change in the relevant 'event', falls within paragraph 8(1) of Schedule 15 to the WCA 1981, the correct approach is for the procedure set out in paragraph 8(2) to be followed prior to the confirmation of the order with modifications. However, where the proposed modification does not fall within paragraph 8(1) of Schedule 15 to the 1981 Act, there may not be the same opportunity for representations/objections to be made or for a local inquiry to be held in relation to the proposed modification. In such circumstances, the considerations set out in paragraphs 3.3 and 3.5 above will be relevant.

4. No event specified

4.1. An order that does not specify any event is clearly not in the form set out at Schedule 2 to the Regulations: it (i) is not "in a form substantially to the like effect"; (ii) cannot be

regarded as containing the type of “necessary” omission contemplated by regulation 4 of the Regulations; and (iii) contains an error of substance.

4.2. Omitting the relevant event cannot be regarded as a necessary omission and clearly has the potential to prejudice an interested party’s interests, since the basis on which the order was made will not be known. Such an omission cannot be regarded as a minor error.

4.3. Where no event has been specified on an order, the correct approach is that which is set out in paragraph 3.5 above: the order should be rejected and returned to the relevant surveying authority with a written explanation as to why the order was rejected, together with a written recommendation that the surveying authority should notify all interested parties of such rejection and of the reasons for such rejection.

4.4. An example of a difficult case in this area would be an order that did not refer to an event, but instead stated that the order was made “in accordance with a direction made to the authority by the Secretary of State under paragraph 4(2) of Schedule 14 to the 1981 Act”. This situation could arise in the context of an application for an order under s53(5) of the 1981 Act.

4.5. By virtue of s53(5) of the 1981 Act, “Any person may apply to the authority for an order under [section 53(2) of the 1981 Act] which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within [section 53(3)(b) or (c) of the 1981 Act]”. Where an authority decides not to make an order, the applicant may serve notice of appeal against that decision on the Secretary of State and on the authority (paragraph 4(1) of Schedule 14 to the 1981 Act). If on considering the appeal the Secretary of State consider that an order should be made, paragraph 4(2) of Schedule 14 to the Act provides that “he shall give to the authority such directions as appear to him necessary for the purpose”.

4.6. Whilst the Secretary of State direct the authority to make an order, the order itself should nevertheless state, in accordance with Schedule 2 to the Regulations, the event which has given rise to the order (regardless of whether it is the authority or the Secretary of State that consider that an order should be made).

4.7. The difficulty in this area is perhaps caused by the words italicised in the following extract from the prescribed form (Schedule 2 to the Regulations): “This Order is made by (name of surveying authority) under section ((53(2)(a)) (53(2)(b)….) of the [1981 Act] because it appears to that authority… [that a modification order should be made in consequence of an event]”. Where the decision that an order should be made originates from the Secretary of State, rather than from the particular authority in question, an argument could perhaps be made that the order should read: “This Order is made by (name of surveying authority) under section ((53(2)(a)) (53(2)(b)….) of the [1981 Act] because it appears to the Secretary of State (who has directed the authority to that effect)….”. Such an amendment would be regarded as the sort of “insertion[..] or omission[..] as [is] necessary in [the] particular case” (regulation 2 of the Regulations) and the form would be regarded as “substantially to the like effect” as the prescribed form.

4.8. Whilst we are of the opinion that it would be acceptable to amend the name of the party that considers that an order should be made, the surveying authority must make the order, and the order must specify the event on which the order is based.

5. Wrong event specified

5.1. Where the wrong event has been specified, an Inspector may use his or her powers of modification only where the error is minor (see paragraph 3.5 above).

5.2. An example of an error of substance is where it is evident that the order making authority (‘**OMA**’) has cited the wrong event and so has applied the wrong criteria in making the order. For example, an order is made to reclassify a footpath as a byway but the event specified is s53(3)(c)(i) (which is for adding a way to the map where no right is recorded) rather than s53(3)(c)(ii) (which is for modifying rights already recorded). As the tests to be satisfied for these two subsections are different, they are not interchangeable.

5.3. On the other hand, a slip of the hand will not necessarily render an order invalid. Where it is evident from the remainder of the order and the surrounding circumstances that the requirements of the 1981 Act have been applied correctly, even though the wrong event has been stated, there seems to be no reason why an Inspector could not use his or her powers of modification. For example, an OMA cites s53(3)(c)(i) as the relevant event, yet it is apparent that what the OMA had in mind from the remainder of the order and the notice was that there is no public right of way over land shown in the map and statement as a highway of any description (s53(3)(c)(iii)).

5.4. The public has an interest in understanding the reasons that lie behind an order; if such reasons are mis-stated, the decision whether or not to challenge an order may be affected. Therefore, where the wrong event is specified, modification will rarely be appropriate.

5.5. For the situation where, during the course of an inquiry (or during the course of otherwise hearing representations/objections), facts come to light which suggest that the definitive map should depart from the proposed order (which may require the relevant ‘event’ or ‘events’ being amended), see paragraphs 3.6 and 3.7 above.

5.6. As a separate scenario, where an order has been made under s53(3)(b) of the 1981 Act, and the user evidence does not point towards the expiration of a sufficient period of time to raise a presumption that the way has been dedicated as a public right of way, but the accompanying documentary evidence does support dedication, the Inspector may modify the event to s53(3)(c)(i) provided that he or she is satisfied that the error is not substantive.

6. More than one ‘event’ should have been specified but was not

6.1. The question here is whether the error is minor or substantive. The public has an interest in understanding the reasons that lie behind an order; if such reasons are mis-stated, the decision whether or not to make a representation

with respect to an order may be affected. Therefore, where more than one event should have been but was not specified, modification will rarely be appropriate.

6.2. For the situation where, during the course of an inquiry (or during the course of otherwise hearing representations/objections), facts come to light which suggest that the definitive map should depart from the proposed order (which may require the relevant ‘event’ or ‘events’ being amended), see paragraphs 3.6 and 3.7 above.

7. Order specifies more than one ‘event’, but one or more is redundant

7.1. Leading the public to believe that there are multiple reasons for the making of an order, when one or more of such reasons are (or later turn out to be) redundant, has the potential to prejudice the interests of the public, since the grounds for making an order may thereby appear stronger than they are, with a resultant effect on the public’s willingness to object. Therefore, where an order specifies more than one event, but one or more is (or turns out to be) redundant, modification will rarely be appropriate.

7.2. For the situation where, during the course of an inquiry (or during the course of otherwise hearing representations/objections), facts come to light which suggest that the definitive map should depart from the proposed order (which may require the relevant ‘event’ or ‘events’ being amended), see paragraphs 3.6 and 3.7 above.

8. Order cites section 53(2)(a) of the 1981 Act, when it should have cited section 53(2)(b), or vice versa

8.1. Very occasionally an order cites s53(2)(a) of the 1981 Act instead of s53(2)(b) or s53(2)(b) instead of s53(2)(a). This is not necessarily wrong. The correct subsection is determined by the date of the event giving rise to the order. If the wrong subsection has been cited, Inspectors will have to decide whether to modify the order in the light of the principles set out in paragraph 3.5 above.

9. Modifying the order map

9.1. Inspectors could use their powers of modification to modify order maps, however they cannot be replaced and modifications cannot be made which could not be shown on the order map i.e. if the path went off the map.

9.2. In Wildlife and Countryside Act cases, the orders effectively modify the definitive map and statement upon confirmation. Whilst it is true that the schedule takes precedence over the order map, paragraph 2 of Schedule 2 of the regulations (SI 1993/12) provides that the definitive map '..shall be modified as described in [Part I] [and] [Part II] of the schedule and shown on the map attached to the order'. The regulations are therefore quite clear on this point – the definitive map may only be modified to show that information in the schedule and on the order map.

9.3. Inspectors cannot propose modifications where those modifications cannot be shown completely on the order map.

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Appendix 11

TRF's Grounds of Appeal and annexures

Application for a definitive map and statement modification order to upgrade Bridleway 17, Beaminster, to a byway open to all traffic

Appeal to the Secretary of State under Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981, against Dorset County Council's determination not to make the order

Grounds of Appeal

Contents

1. Background

1.1. This appeal is made by the Trail Riders Fellowship (TRF) acting as appointed agent (Attachment A) of [redacted] who made the application on behalf of the Friends of Dorset Rights of Way on 21 December 2004. [redacted] by letter of 4 October 2010 appointed the TRF to be his agent in all matters regarding this application, and that letter of agency was accepted by the Supreme Court. (Attachment B)

1.2. This application was given the Dorset County Council (DCC) reference RW/T354, and it was under reference T354 that the application became subject to a challenge to its validity, culminating in an Order of the Supreme Court dated 13 April 2015, declaring that application T354 was made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981. (Attachment B)

1.3. In a report to the Regulatory Committee (meeting on 21 March 2019) dated 6 March 2019, Matthew Piles, Service Director, Environment, Infrastructure and Economy, advised the Committee that it was "*recommended that an order be made to record the route between Point A and Point 1 on the plan 18/13 as a byway open to all traffic*" (Plan 18/13 is Attachment C)

1.4. At its meeting on 21 March 2019, the Regulatory Committee went against officers' advice and resolved not to make an order in respect of the length shown on plan 18/13 as A-B-C.

1.5. In a letter dated 26 March 2019, Vanessa Penny, Definitive Map Team Manager, Planning and Regulation Team, advised the TRF that "*Application T354 should be accepted in part and an order made to record the route as shown between points C and I on drawing 18/13 as a byway open to all traffic*" (Attachment D)

1.6. The TRF is therefore exercising its right of appeal to the Secretary of State against Dorset County Council's determination not to make the order sought.

2. Validity of this appeal

2.1. The application 'Form A' was actually four applications on one form. Nothing in Schedule 14 states that this cannot be done, and the layout of Dorset County Council's template Form A invites a 'set' of applications to be made together.

2.2. The application for the route described by Dorset County Council as A-B-C is to 'upgrade' (i.e. modify) the status of Bridleway 17 Beaminster to byway open to all traffic. This is clear from the entry against (c) "from: 1 - ST 49105 03415 to: 1 - ST 49555 03010".

2.3. That is a single 'application entity', separate in fact and law from the other three 'application entities' on the same Form A. The reason for setting it out in this way is the commonality of evidence.

2.4. PINS' "Schedule 14 Appeal Guidance" states, "*The right of appeal does not exist if the authority issues a refusal notice to make an order for the status applied for but resolves to make an order for a different status or where the authority makes an order which differs from the application in some other way. The right of appeal against the authority's determination is only valid if that determination is not to make an order at all.*"

2.5. Firstly, we say again that the application for what is now termed A-B-C is a stand-alone application in its own right, was rejected by DCC, and is therefore amenable in its own right to an appeal under Schedule 14.

2.6. Secondly, we respectfully say that this guidance is wrong, or at least misleading. In the matter of *Dorset County Council (Bridleway 3 (part) and Bridleway 4, Piddlehinton) Definitive Map and Statement Modification Order 2010. PINS Ref'n FPS/C1245/7/36,* two separate applications were made to Dorset County Council to upgrade various bridleways (in a 'connected cluster') to BOAT status. DCC officers quite reasonably treated these two applications as one for the purpose of handling the evidence, but the decision-making committee rejected officers' advice and declined to make the order.

2.7. On appeal under Schedule 14 the Inspector appointed directed DCC to make orders, embracing all of the two applications, except for the northern end of one leg, that on the basis of 'insufficient evidence.' DCC chose to make one composite order. Objections were lodged to this order, and the TRF presented a case largely in two heads:

- Evidence and submission to show that all of A-E and C-E-B-D are historical public carriage roads, and,
- The order should be modified to include leg B-D, which was refused in the Schedule 14 appeal decision.

2.8. In her interim decision letter of 2 December 2014 (FPS/C1245/7/36) Inspector Mrs Slade notes:

2.9. [16] "I was also requested to include in the modification the length of the route to the north of the Order route to Drakes Lane, which had formed part of one of the original applications. This part of the route lies outside the scope of the Order plan. It was [redacted] view that failure to include the onward section would prevent any future modification of the DMS which to accurately reflect what the TRF believes to be the correct status of that part of the original application route.

2.10. [17] "I agreed to hear the evidence at the inquiry in relation to the whole of the application route on the basis that I would then be able to consider whether or not it was appropriate to make such a modification; bearing in mind that such modifications would require advertising, thus allowing a further statutory notice period for objections. I also made it clear to the other participants at the inquiry that they were at liberty to argue against such modifications.

2.11. [19] "To include the onward route as originally claimed by FoDRoW would require the addition to the Order of a map and a revised schedule, a draft of which was supplied by [redacted] at the inquiry. I have considered the situation carefully, and taken account of the arguments for and against such a modification. Whilst I understand the implications as expressed by [redacted], I consider that to make such a fundamental alteration to the Order would be an abuse of the process. It may be acceptable to add a map to an Order for clarification purposes (for example to clarify the location or some other aspect of a route) but to add a map for an additional length route which would extend significantly beyond the scope of the map attached to the Order as made would be a very substantial alteration.

2.12. [20] "My powers of modification are quite wide, but I must exercise those powers fairly and with discretion. In this case I have concluded that to modify the Order in the way requested would be too significant a change, and make the Order substantially different from the one I am considering. I have therefore declined to make any modification in respect of the additional claimed section of the route."

2.13. Mrs Slade maintained her view in her final decision letter. The TRF made an application to the Administrative Court, primarily on a ground concerning 'Winchester compliance', and adding a second ground that the Inspector was wrong to have held that the modification to the order sought was outwith her powers of modification, because in so doing the order applicants lost (because of s.67 of NERCA) all possibility of having this leg properly recorded as a BOAT.

2.14. The Judge held that this second limb was correctly a matter of the Inspector's exercise of discretion and rejected that ground of claim. [2016] EWHC 2083 (Admin).

2.15. In this current case, if the Secretary of State holds that there is no right of Schedule 14 appeal as regards A-B-C, then the applicant can do nothing more than object to the order for D-I when that is made by DCC, on the ground that it should include A-B-C as well. But it is then entirely within the discretion of the Inspector as to whether he or she will even entertain so-modifying the order, and hearing evidence accordingly.

2.16. For the Secretary of State to bar a Schedule 14 appeal now as regards the application in respect of A-B-C wrongly (in our view) deprives the applicant of the right of appeal, and leaves only a lottery as to whether a later Inspector will modify the order as made.

2.17. That cannot be right. This would be an unfair and biased approach as between applicants, where some have a statutory right to have their evidence heard, and some rely on the exercise of an Inspector's absolute discretion. There should be equal treatment at each stage of the appeal and determinative process.

3. Structure of these grounds of appeal

3.1. The basis of this appeal is that Dorset County Council officers have properly set out in the report to committee (at least some of) the various pieces of historical documentary evidence supplied by [redacted] both in matters of fact (interpretation) and law, and have given proper weight to those pieces of evidence, and to the evidence as a whole. The minutes of the Regulatory Committee give no clear reason as to the grounds on which members went against officers' advice. When all the evidence is properly considered and weighed, then on the balance of probabilities a public vehicular right of way subsists along the application route.

3.2. These grounds accept the Report to the Regulatory Committee on 21 March 2019, and add below some additional evidence and legal submissions.

4. The evidence reconsidered

4.1. **Greenwood's map of 1826.** As DCC says, Greenwood shows the application route as a 'cross road'. The most-recent judicial consideration of the meaning of 'cross road' in old

maps is in Fortune v. Wiltshire Council [2012] EWCA Civ 334, Lewison LJ at [54] (our emphasis).

4.2. "The judge moved on to consider Greenwood's map of Wiltshire, produced in 1829. Greenwood was a well-known commercial map-maker who produced maps of many English counties. The judge considered that this map also showed a thoroughfare which included Rowden Lane. Prof Williamson agreed. It was not coloured in the same way as the Bath road; but nor were a multitude of other roads linking disparate settlements. The legend of the map showed that the colouring of the Bath Road meant that it was a turnpike or toll road, whereas that of Rowden Lane meant that it was a "cross road". As the judge pointed out, in 1829 the expression "cross road" did not have its modern meaning of a point at which two roads cross. Rather in "old maps and documents, a "cross road" included a highway running between, and joining other, regional centres". Indeed that is the first meaning given to the expression in the Oxford English Dictionary ("A road crossing another, or running across between two main roads; a by-road"). Prof Williamson agreed in cross-examination that a "cross road" was a reference to a road forming part of a thoroughfare. The judge gave a further explanation of the significance of the expression later in his judgment (§ 733) by reference to guidance given to the Planning Inspectorate:

4.3. "In modern usage, the term "cross road" and "crossroads" are generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term "cross road". These include a highway running between, and joining, other regional centres. Inspectors will, therefore, need to take account that the meaning of the term may vary depending on a road pattern/markings in each map."

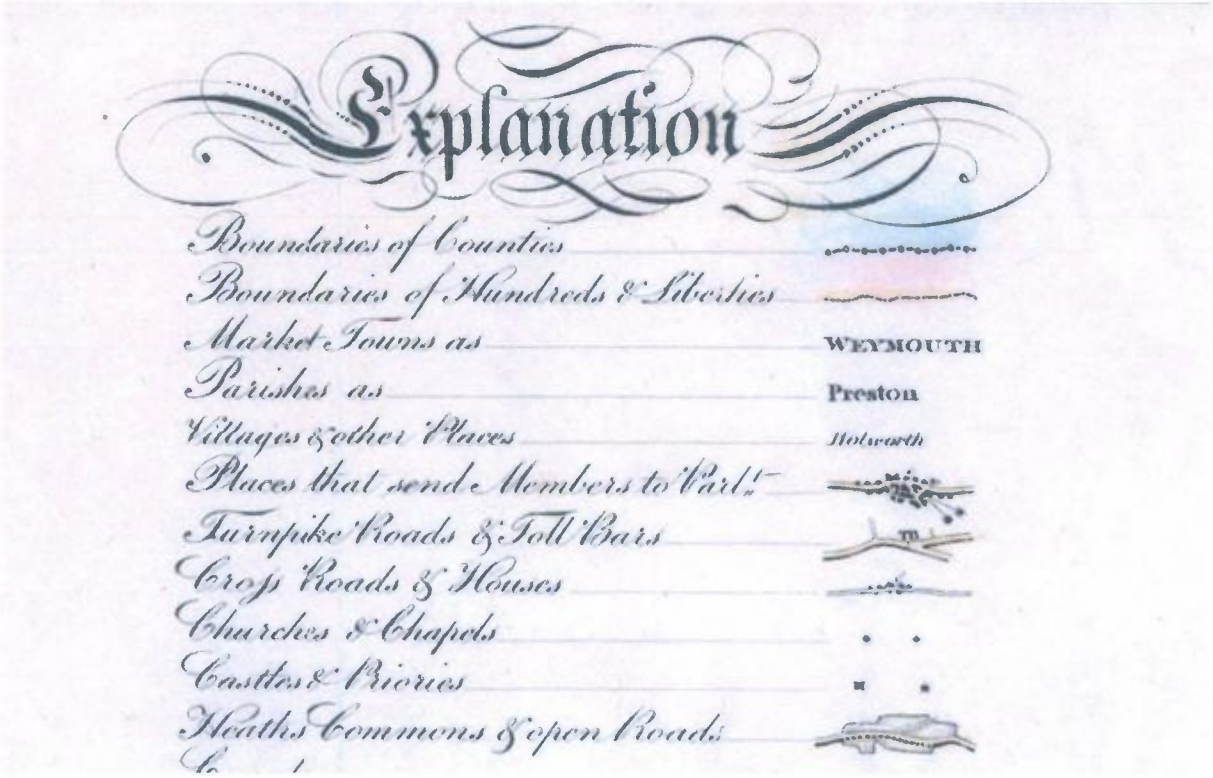
4.4. "The guidance went on to urge caution as the judge recognised:

4.5. "In considering evidence it should be borne in mind that the recording of a way as a cross road on a map or other document may not be proof that the way was a public highway, or enjoyed a particular status at the time. It may only be an indication of what the author believed (or, where the contents had been copied from elsewhere – as sometimes happened – that he accepted what the previous author believed). In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality of the evidence in reaching a decision."

4.6. "[56] The judge concluded that Greenwood's map supported "the emerging picture" of an established thoroughfare. In our judgment the label "cross road"

added further support. This map also shows the angle between Rowden Lane and Gipsy Lane as a less acute angle than the "V" shape that Prof Williamson spoke to."

4.7. This below is the 'Explanation' on Greenwood's map.



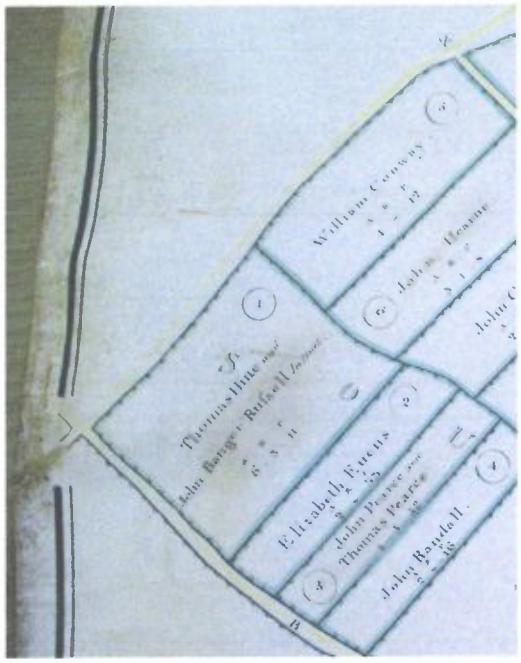
4.8. In ***Consistency Guidelines*, May 2015, Section 12 Maps (Commercial, Ordnance Survey, Estate Etc) And Aerial Photographs.**

4.9. "Hollins v Oldham 1995 C94/0206, unreported. Judicial view on cross roads: 'Burdett's map of 1777 identifies two types of roads on its key: firstly turnpike roads, that is to say roads which could only be used on payment of a toll and, secondly, other types of roads which are called cross roads ... This latter category, it seems to me, must mean a public road in respect of which no toll was payable'."

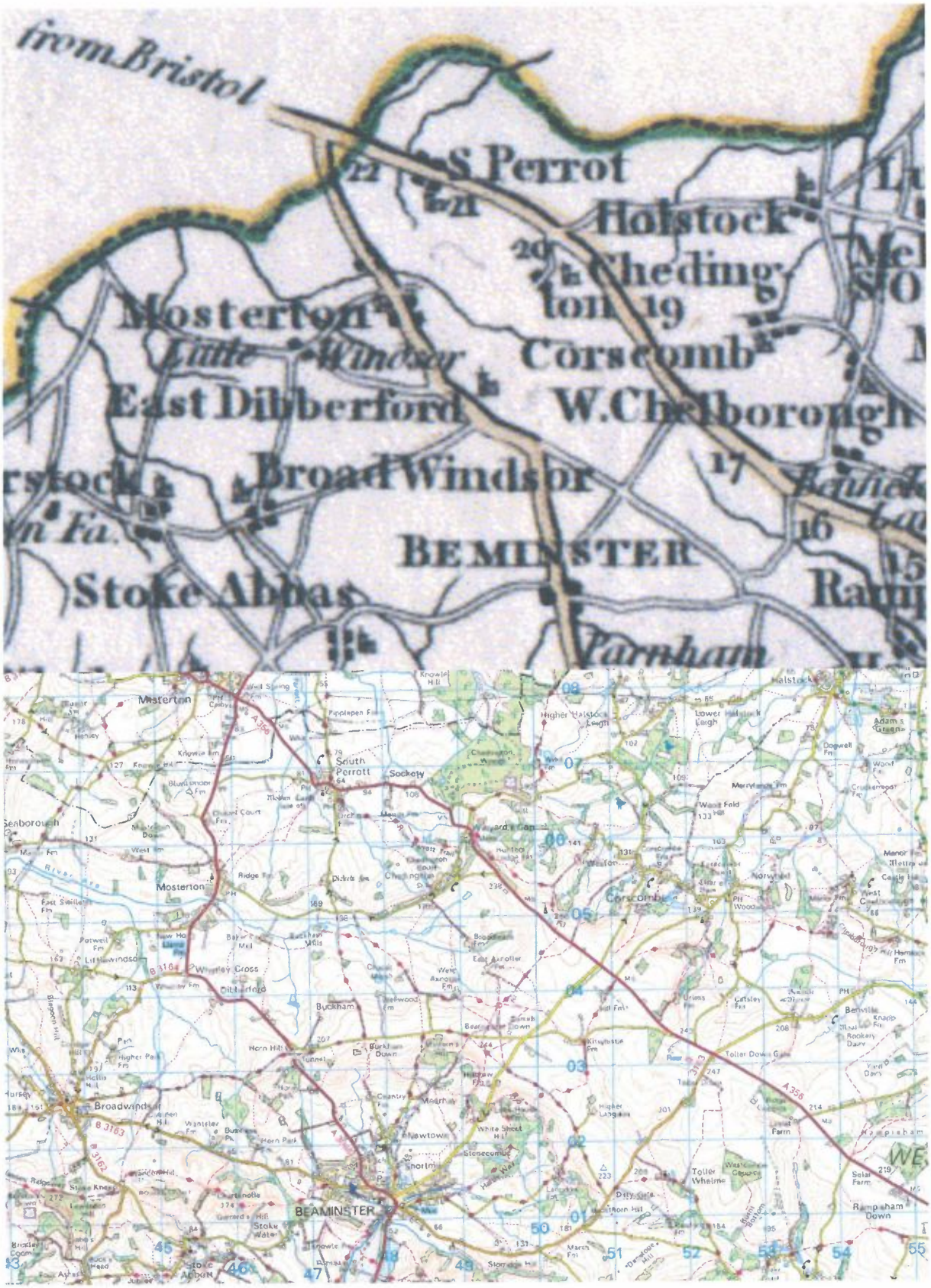
4.10. **Taylor's maps of 1765 and 1796.** DCC says that the road shown by Taylor in 1796 "*appears to show the claimed byway*" and in 1765, "*also shows the route.*" On closer examination the probability of correspondence is higher than 'appears'. Consider Taylor's map of 1796. Taylor has a 'triangle' of roads, just south of Beaminster Down, and that matches a similar pattern on the modern Ordnance Map, where two sides of the triangle are sealed motor roads, and one side is a public bridleway.

4.11. **The Beaminster Inclosure Award of 1809.** DCC is correct in describing the awarded road, but it is worth noting also how the award plan treats the road junction at point C of A-B-C. The border of the plan is broken to show the road junction, and to indicate

the linear continuation of the road 'to Hook', as awarded. The inclosure commissioners had no remit to award this continuation, and it runs only a relatively short distance to make a junction with the largely east-west road, now the C102, making a 'to xxxxxx' label too remote.



4.12. There is additional evidence in the form of John Cary's 'Map of Dorsetshire 1787'. No scale is given, but the original plate is little bigger than A4. An extract of this map is reproduced, with commentary, on the following page, and a copy of the whole plate is appended.


from Bristol
S Perrot
Holstock
Mosterton
Little Windsor
Corscomb
East Dilberford
W.Chelborough
Broad Windsor
BEMINSTER
Stoke Abbas
Parnham
Mosterton
South Perrott
Sockely
Holstock
Corscombe
Mosterton
Whitley Cross
Dilford
Buckham
Broadwindsor
Newtown
BEAMINSTER
Toller Whelme
Rampsham Down
A356
B3163

4.13. Maps of this scale, in 1787, are inevitably schematic to some degree, and the evolution of the roads in the 230 years since can make the maps seem incorrect at first glance. Cary shows the road from Beaminster mostly northwards via Mosterton (do not confuse with Misterton, just to the north) as a turnpike, and he has a 'Y' junction of turnpikes (A356, A3066), just beyond the county boundary. This can be matched against the modern OS map, which is not schematic.

4.14. On Cary, follow the road running due east out of Beaminster. That is a schematic rendering of the B3163. Follow on the OS to just east of OS spot height 181 and then fork right on the 'yellow' road. Shortly an unclassified road (shown with red ORPA dots) turn left (north) and this is Cary's branch cross road, running towards the northwest.

4.15. There is immediately a road on Cary off to the right (east) near Dirty Gate, towards '16', and this corresponds to once more to the B3163.

4.16. Follow Cary's road northwestwards on the modern OS, and after the access to Higher Langdon this becomes the southern end of the whole of the applied-for route.

4.17. At the junction with the 'yellow' road near Hillbrow Farm, that yellow road going towards the northeast is clearly Cary's branch road towards Corscombe, passing through the 'e' of 'W. Chelborough'.

4.18. Cary's continuing line is then the subject of this appeal (currently Bridleway 17) turning westwards (schematically again) to make a junction with Cary's turnpike to Mosterton, now the junction on the A3066 at Horn Hill.

4.19. This reconciliation of the Cary map against modern OS also sits very well with the 1800 'Plan of roads in the neighbourhood of Beaminster', as put in with the application. That plan shows 'Dirty Gate', and the pattern of roads east from Beaminster, then cutting back towards the northwest, the application route, and beyond towards Bristol.

4.20. Cary's map shows little other than roads and settlements. If it was not intended for travellers, then for whom would it hold interest sufficient to buy?

4.21. A road that, in the 'middle of nowhere' and for just a short distance, changes status from a general-purpose road to only a bridle road, would be curious advice and reassurance to sell to travellers.

5. Conclusions from the evidence

5.1. Taking all of this evidence together, it is sufficiently clear that the application route was historically part of a much longer thoroughfare. Look at the whole plate of Cary's 1787 map and it is immediately visible that the cross road encompassing the order route continued southeastwards as a linear entity at least as far as Upway. That is about 18 miles, and although Cary's representation is schematic comparison with the modern OS suggests that this route was (near Upway) along one of the 'Dorset Ridgeways', and, further towards Beaminster, coincided with part of a Roman road. Overall, this has the character of a very ancient, long through route, of which the application route was one very short part. This longer route submission is contextual, and the more-local evidence goes to show the status of the application route.

6. The 'through route presumption'

[This is not argued to be a legal presumption; it is more one of common sense and experience.]

6.1. Part 2 of PINS's Consistency Guidelines states:

> "Rural Culs-de-Sac
>
> "2.48, The courts have long recognised that, in certain circumstances, culs-de-sac in rural areas can be highways. (e.g. Eyre v. New Forest Highways Board 1892, Moser v. Ambleside 1925, A-G and Newton Abbott v. Dyer 1947 and Roberts v. Webster 1967). Most frequently, such a situation arises where a cul-de-sac is the only way to or from a place of public interest or where changes to the highways network have turned what was part of a through road into a cul-de-sac. Before recognising a cul-de-sac as a highway, Inspectors will need to be persuaded that special circumstances exist.
>
> "2.49, In Eyre v New Forest Highway Board 1892 Wills J also covers the situation in which two apparent culs-de-sac are created by reason of uncertainty over the status of a short, linking section (in that case a track over a common). He held that, where a short section of uncertain status exists it can be presumed that its status is that of the two highways linked by it."

6.2. Expanding this guidance a little further is of assistance:

6.3. In Eyre v. New Forest Highway Board (1892) JP 517, the Court of Appeal under Lord Esher, MR, considered an appeal against a decision of Wills J, who had rejected an application by [redacted] that Tinker's Lane in the New Forest was not a publicly repairable highway and should not be made up by the Board. Lord Esher commended

Wills J's summing-up as "... *copious and clear and a complete exposition of the law on the subject; it was a clear and correct direction to the jury on all the points raised.*"

6.4. Wills J: "It seems that there is a turnpike road, or a high road, on one side of Cadnam Common; on the other side, there is that road that leads to the disputed portion, and beyond that if you pass over that disputed portion, you come to Tinker's Lane which leads apparently to a number of places. It seems to connect itself with the high road to Salisbury, and with other more important centres, and I should gather from what I have heard that there are more important centres of population in the opposite direction. You have heard what [redacted] says about there being that better and shorter road by which to go. All that appears to me on the evidence is that, for some reason or other, whether it was that they liked the picturesque (which is not very likely), or whether it is that it is really shorter; there were a certain portion of the people from first to last who wished to go that way. It is by the continual passage of people who wish to go along a particular spot that evidence of there being a high road is created; and taking the high roads in the country, a great deal more than half of them have no better origin and rest upon no more definite foundation than that. It is perfectly true that it is a necessary element in the legal definition of a highway that it must lead from one definite place to some other definite place, and that you cannot have a public right to indefinitely stray over a common for instance... There is no such right as that known to the law. Therefore, there must be a definite terminus, and a more or less definite direction...

6.5. "But supposing you think Tinker's Lane is a public highway, what would be the meaning in a country place like that of a highway which ends in a cul-de-sac, and ends at a gate onto a common? Such things exist in large towns... but who ever found such a thing in a country district like this, where one of the public, if there were any public who wanted to use it at all, would drive up to that gate for the purpose of driving back again? ... It is a just observation that if you think Tinkers Lane was a public highway, an old and ancient public highway, why should it be so unless it leads across that common to some of those places beyond? I cannot conceive myself how that could be a public highway, or to what purpose it could be dedicated or in what way it could be used so as to become a public highway, unless it was to pass over from that side of the country to this side of the country. Therefore it seems to me, after all said and done, that the evidence with regard to this little piece across the green cannot be severed from the other... it would take a great deal to persuade me that it was possible that that state of things should co-exist with no public way across the little piece of green... I am not laying this down as law; but I cannot under- stand how there could be a public way up to the gate – practically, I mean; I do not mean theoretically, - but how in a locality like this there

could be a public highway up to the gate without there being a highway beyond it. If there were a public highway up Tinker's Lane before 1835, it does not seem to me at all a wrong step to take, or an unreasonable step to take, to say there must have been one across that green."

6.6. There are three often-cited cases on culs-de-sac and whether such can be (public) highways: Roberts v. Webster (1967) 66 LGR 298; A.G. v. Antrobus [1905] 2Ch 188; Bourke v. Davis, [1890] 44 ChD 110. In each of these the way in dispute was (apparently) a genuine dead-end with no 'lost' continuation. Fundamental argument in each was whether or not a cul-de-sac (especially in the countryside) could be a (public) highway. In each case the court took the point that the law presumes a highway is a through-route unless there are exceptional local circumstances: e.g. a place of public resort, or that the way was expressly laid out under the authority of statute, such as an inclosure award. In A.G. (At Relation of A H Hastie) v. Godstone RDC (1912) JP 188, Parker J was called upon to give a declaration that a cluster of minor roads were public and publicly repairable highways.

6.7. "The roads in question certainly existed far back into the eighteenth century. They are shown in many old maps. They have for the most part well-defined hedges and ditches on either side, the width between the ditches, as is often the case with old country roads, varying considerably. There is nothing to distinguish any part of these roads respectively from any other part except the state of repair. They are continuous roads throughout and furnish convenient short cuts between main roads to the north and south respectively [note the similarity of logic here with Wills J in Eyre]. It is possible, of course, that a public way may end in a cul-de-sac, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not. It was suggested that there might be a public carriageway ending in a public footpath and that Cottage Lane and St Pier's Lane are public carriageways to the points to which they are admittedly highways, and public footpaths for the rest of their length. I cannot find any evidence which points to this solution of the difficulty, and so far, at any rate as evidence of the user of the road is concerned, there is no difference qua the nature of that user between those parts of the roads which are admittedly highways and those parts as to which the public right is in issue."

6.8. The matter was also touched upon in Brand & Another v. Philip Lund (Consultants) Ltd (1989) Unreported. Ch 1985 B. No. 532 (this is the case reference given in the 'Blue Book': there may be a typographical mistake here, as the hearing was on 18 July 1989?) Judge Paul Baker QC (sitting as a Judge of the High Court).

6.9. "Before I come to the evidence I should deal with certain submissions of law. supported by a number of authorities which have been placed before me by [redacted] The first one is that a public vehicular highway is and normally must be used to go from one public highway to another. In support of that, there was cited the well-known case of Attorney General v. Antrobus [1905] 2 Ch 188. That case concerned a path or track leading to Stonehenge. It was held to be not a public highway. I cannot accept the proposition precisely as stated. The position as I see it is this, that generally a public right of way is a right of passing from one public place or highway to another. Here the claimed right is from one highway (at Bellingdon) to another (at Chesham Vale). Hence I do not have to consider the position as to cul-de-sacs and tracks, as in the Antrobus case. The part of the formulation that I do not accept is the wording that it normally must be used to go from one public highway to another. In my judgment, it does not have to be shown that it is normally used to go from one end to the other. It may normally be used by people going from either end to and from premises fronting on to it and less frequently used by persons traversing its whole length. The user necessary to establish a right of way is to be considered separately from the way itself."

6.10. Although it is not in any way a 'precedent', it is useful to note the view of Inspector Dr T O Pritchard, when tasked to consider the true status of a through-route that currently 'changes status' part-way. He said it is "... *Improbable for part of a continuous route to be part footpath and part carriageway*", expressly taking the Godstone case as authority. [FPS/A4710/7/22 723, of 31 March 1999].

7. Summary

7.1. If it is accepted that the application route was part of a thoroughfare, and thus a 'cross road' (as it is described on Greenwood's map), then it was historically either a public bridleway or a public general-purpose road. Its modern-era recording as a public bridleway on the definitive map and statement may have been on an historical basis, or, more probably, on the basis of user recent to the date of survey.

7.2. If it is accepted that the application route was part of such a thoroughfare, and thus a 'cross road', then it is improbable that the highway status changed part-way along. if one end was historically a public general purpose road (i.e. in this circumstance a cart road) then it is more probable that the whole thoroughfare was a highway of the same traffic status.

7.3. There is no evidence or comment in the pre-determination consultation responses that is incompatible with the application route being a 'lost way' as regards its historical traffic status. Weighing together the historical evidence, the opinion of experts, and how the

courts view 'cross roads', 'thoroughfares', and a presumption of continuing through-route traffic status, this application should lead to the making of the order sought.

Ends.

Attachments

A. Letter of 4 October 2010 from [redacted] who made the application on behalf of the Friends of Dorset Rights of Way on 21 December 2004, appointing the TRF to be his agent in this case.

B. Order of the Supreme Court dated 13 April 2015.

C. DCC report plan 18/13.

D. Notice of refusal of application, letter dated 26 March 2019.

E. John Cary's Map of Dorsetshire 1787 (dated by others in the same series).

F. The application made to the surveying authority. This application lists the evidence submitted with the application, and this is appended here (indexed) using item references, a.a., b.b., et seq to and including o.o. The application includes the notices associated with the application.

G. A map showing the alleged right(s) of way.

H. Paper, "*Byway Claim for Bridleways 17 & 35 Beaminster*" as submitted with the application.

I. Report to the Regulatory Committee, 21 March 2019. Officers' analysis of documentary evidence.

J. Regulatory Committee minutes of 21 March 2019. Reasons for refusal of application.

A

FoDRoW,
[redacted]

Chief Executive,
Dorset County Council,
County Hall,
Colliton Park,
Dorchester,
Dorset,
DT1 1XJ.

4th October 2010

Re: **Rights of Way Definitive Map Modification Orders**

Dear Sir,

Friends of Dorset's Rights of Way (FoDRoW) currently has a number of applications for Definitive Map Modifications (DMMOs) lodged with Dorset County Council. With immediate effect the Trail Riders' Fellowship (TRF) is managing and prosecuting these applications on behalf of FoDRoW. All correspondence regarding these applications should now be directed to the TRF instead of FoDRoW. Please also take this letter as our authority for Dorset County Council to accept and act on correspondence and instructions from the TRF relating to these applications.

The contact details for the Trail Rider's Fellowship are included below. Please send all correspondence electronically by email where possible.

[redacted] (TRF),
[redacted]

Tel: [redacted]
Email: [redacted]@trf.org.uk

Please let me know if you need anything further from FoDRoW or if any further details or clarification is required.

Yours faithfully,

[redacted]
FoDRoW Chairman

IN THE SUPREME COURT OF THE UNITED KINGDOM

13 April 2015

Before:

Lord Neuberger
Lord Clarke
Lord Sumption
Lord Carnwath
Lord Toulson

R (on the application of Trail Riders Fellowship and another) (Respondents) *v* Dorset County Council (Appellant)

AFTER HEARING Counsel for the Appellant, Counsel for the First Respondent and the Intervener on 15 January 2015 and

THE COURT ORDERED THAT

1) The appeal be dismissed

2) The claim for judicial review of the Appellant's decision of 2 November 2010 succeeds

3) By 4.00pm on 15 April 2015 the Appellant will pay the First Respondent's costs of the appeal in the agreed sum of £10,000 (inclusive of VAT) and

IT IS DECLARED that

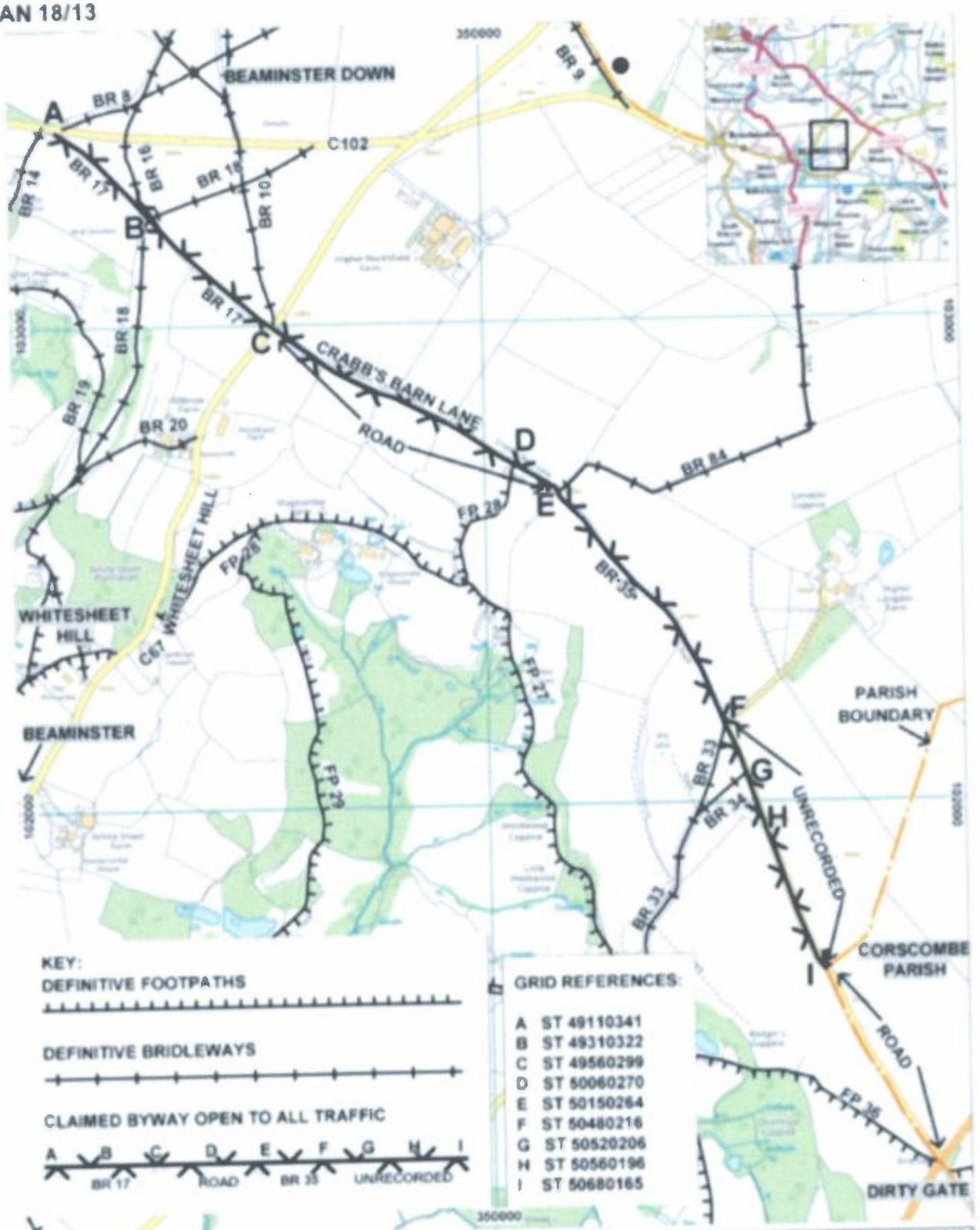
4) The five applications dated 14 July 2004 (ref. T338), 25 September 2004 (ref. T339), 21 December 2004 (ref. 350), 21 December 2004 (ref. 353) and 21 December 2004 (ref. T 354) made to the Appellant under section 53(5) of the Wildlife and Countryside Act 1981 were made in accordance with paragraph 1 of Schedule 14 to the Wildlife and Countryside Act 1981.

[redacted]

Registrar
13 April 2015

APPENDIX 1

PLAN 18/13



County Hall
Colliton Park
Dorchester
DT1 1XJ

Telephone: 01305 224719
Minicom: 01305 267933
We welcome calls via text Relay

Email: v.penny@dorsetcc.gov.uk
Website: www.dorsetforyou.com

Official

[redacted]
Trail Riders Fellowship

By email

Date: 26 March 2019
Ask for: Vanessa Penny
My ref: VP RW/T339/T353/T354
Your ref:

Planning and Regulation

Dear Sirs

WILDLIFE AND COUNTRYSIDE ACT 1981

T339 - Application for a definitive map and statement modification order to upgrade Bridleway 8 (part), Cheselbourne and Bridleway 18, Dewlish to Byway Open to all Traffic.

T353 - Application for a definitive map and statement modification order to upgrade Bridleway 14, Beaminster, to a Byway open to all Traffic.

T354 - Application for a definitive map and statement modification order to upgrade Bridleways 17 (Part), 35 and Crabb's Barn Lane, Beaminster, to a Byway Open to all Traffic.

Your applications to modify the definitive map and statement have now been considered by the Regulatory Committee.

Their decisions were that:
1. Application T339 should be accepted and an order made.
2. Application T353 should be refused and no order made.
3. Application T354 should be accepted in part and an order made to record the route as shown between points C and I on drawing 18/13 as a byway open to all traffic.

The minutes will be available for viewing soon (approximately two weeks following the Committee) on the County Council's website: http://www.dorsetforyou.com/countycommittees Click the link for the Regulatory Committee from the list and then click on the "Browse meetings agendas for this Committee" link.

The County Council will publish Orders reflecting these decisions in due course and you will be sent copies. Notices will also be erected on site and appear in the press. If there are no objections the Orders can be confirmed and the paths recorded on the definitive map and statement of rights of way. However, if there are objections the matters will be referred to the Secretary of State for determination, either by written representations, public hearing or public inquiry.

If you wish to appeal against the decision on application T353, you must notify the Planning Inspectorate of your intention to do so within 28 days of receiving this letter. The address is:

Rights of Way Team
The Planning Inspectorate

Room 3G Hawk
Temple Quay House
2 The Square
Bristol
BS1 6PN

Email: rightsofway2@pins.gsi.gov.uk

A copy of your notice of appeal must also be served on the County Council at the same time.

Yours faithfully

V Penny

Vanessa Penny
Definitive Map Team Manager
Planning and Regulation Team

Dorset County Council is a Data Controller for the purposes of the General Data Protection Regulation 2016 and the Data Protection Act 2018. This Act regulates how we obtain, use and retain personal information. The information you supply will be used for the purpose of fulfilling our functions and duties, including those under the Highways Act 1980, Town and Country Planning Act 1990 and the Wildlife and Countryside Act 1981. Any information provided, including personal details will be available for public inspection, disclosed to interested third parties and may be used during public inquiries and other proceedings. The information will be kept indefinitely. By replying to this correspondence you are consenting to your personal information being retained and used for these purposes. Further information about the use of personal information and data protection is available on our web-site at www.dorsetforyou.com or by contacting the Council's Data Protection Officer.


DORSETSHIRE
by JOHN CARY, Engraver.
SOMERSETSHIRE
WILTSHIRE
HAMPSHIRE
DEVONSHIRE
BRITISH CHANNEL
MILBORN PORT
Sherborne
Yeovil
Dorchester
Bridport
Weymouth
Poole
Wareham
Blandford
Shaftesbury
Salisbury
Christchurch
Lyme
Axminster
Honiton
Crewkerne
Ilminster
Isle of Purbeck
Portland Road
Portland Bill or Point
Studland Bay
Poole Harbour
Longitude West from London

F

FORM A

DORSET COUNTY COUNCIL

APPLICATION FORM FOR A MODIFICATION TO THE COUNTY OF DORSET DEFINITIVE MAP AND STATEMENT OF RIGHTS OF WAY
Wildlife and Countryside Act 1981

To: Chief Executive
Dorset County Council
County Hall
Colliton Park
DORCHESTER
Dorset
DT1 1XJ

I/We (i) Friends of Dorset's Rights of Way (FoDRoW)

of (ii) PO Box 5365, Dorchester, Dorset, DT2 8WH.
hereby apply for an order under Section 53(2) of the Wildlife and Countryside Act 1981 modifying the Definitive Map and Statement for the area by *:-

(a) ~~**Deleting** the footpath / bridleway / byway open to all traffic * which runs~~

from:

to:

(b) **Adding** the ~~footpath / bridleway /~~ *byway open to all traffic* * which runs

from: 1 – ST 49555 03010 2 – ST 50485 02165

to: 1 – ST 50150 02640 2 – ST 50700 01660

(c) **Upgrading/~~downgrading~~** to a ~~footpath / bridleway /~~ *byway open to all traffic* * the ~~footpath/~~bridleway/~~byway open to all traffic~~ which runs

from: 1 – ST 49105 03415 2 – ST 50150 02640

to: 1 – ST 49555 03010 2 – ST 50485 02165

(d) ~~**Varying/adding** to the particulars relating to the footpath / bridleway / byway open to all traffic~~ *

from:

to:

by providing that

and shown on the map annexed hereto (see overleaf).

I/We attach copies of the following documentary evidence [including statements of witnesses] in support of this application:-

(iii) Please see attached report for details of evidence submitted in support of this claim.

Copies of documentary evidence has been supplied on CD, viewable on any Windows PC.

Signed: Date: 21st December 2004

FORM B

DORSET COUNTY COUNCIL

NOTICE OF APPLICATION FOR A MODIFICATION TO THE COUNTY OF DORSET DEFINITIVE MAP AND STATEMENT OF RIGHTS OF WAY

Section 53(5) & Schedule 14 to the Wildlife and Countryside Act 1981

NOTES FOR GUIDANCE OVERLEAF - PLEASE READ CAREFULLY

Section A To (i): [redacted]

Of (ii): [redacted].

Section B Notice is hereby given that on the 21st December 2004

I/We (iii): Friends of Dorset's Rights of Way (FoDRoW)

Of (iv): [redacted]

have made an application to the Dorset County Council that the Definitive Map and Statement for the area be modified by *:

Section C

(a) ~~**Deleting** the *footpath / bridleway / byway open to all traffic** which runs~~

from:

to:

(b) **Adding** the ~~*footpath / bridleway /*~~ *byway open to all traffic* * which runs

from: ST 49555 03010

to: ST 50150 02640

(c) **Upgrading/~~downgrading~~** to a ~~*footpath / bridleway*~~ */ byway open to all traffic** the ~~*footpath*~~ */ bridleway /* ~~*byway open to all traffic**~~ which runs

from: 1 – ST 49105 03415 2 – ST 50150 02640

to: 1 – ST 49555 03010 2 – ST 50485 02165

(d) ~~**Varying/adding to the particulars relating to the footpath / bridleway / byway open to all traffic* which runs**~~

from:

to:

by providing that:

Signed: **Dated:** 21st December 2004

(i) Insert name of landowner(s)
(ii) Insert address of landowner(s)
(iii) Insert your name(s)
(iv) Insert your address
* Delete as appropriate

FORM B

DORSET COUNTY COUNCIL

NOTICE OF APPLICATION FOR A MODIFICATION TO THE COUNTY OF DORSET DEFINITIVE MAP AND STATEMENT OF RIGHTS OF WAY

Section 53(5) & Schedule 14 to the Wildlife and Countryside Act 1981

NOTES FOR GUIDANCE OVERLEAF - PLEASE READ CAREFULLY

Section A To (i): [redacted]

Of (ii): [redacted]

Section B Notice is hereby given that on the 21st December 2004

I/We (iii): Friends of Dorset's Rights of Way (FoDRoW)

Of (iv): [redacted]

have made an application to the Dorset County Council that the Definitive Map and Statement for the area be modified by *:

Section C

(a) **Deleting** ~~the *footpath / bridleway / byway open to all traffic** which runs~~

from:

to:

(b) **Adding** the ~~*footpath / bridleway /*~~ *byway open to all traffic* * which runs

from: 1 – ST 49555 03010 2 – ST 50485 02165

to: 1 – ST 50150 02640 2 – ST 50650 01700

(c) **Upgrading/~~downgrading~~** to a ~~*footpath / bridleway*~~ */ byway open to all traffic** the ~~*footpath*~~ */ bridleway /* ~~*byway open to all traffic**~~ which runs

from: 1 – ST 49105 03415 2 – ST 50150 02640

to: 1 – ST 49555 03010 2 – ST 50485 02165

(d) ~~**Varying/adding to** the particulars relating to *the footpath / bridleway / byway open to all traffic** which runs~~

from:

to:

by providing that:

Signed: **Dated:** 31st December 2004

(i) Insert name of landowner(s)
(ii) Insert address of landowner(s)
(iii) Insert your name(s)
(iv) Insert your address
* Delete as appropriate

FORM B

DORSET COUNTY COUNCIL

NOTICE OF APPLICATION FOR A MODIFICATION TO THE COUNTY OF DORSET DEFINITIVE MAP AND STATEMENT OF RIGHTS OF WAY

Section 53(5) & Schedule 14 to the Wildlife and Countryside Act 1981

NOTES FOR GUIDANCE OVERLEAF - PLEASE READ CAREFULLY

Section A To (i): [redacted]

Of (ii): [redacted]

Section B Notice is hereby given that on the 21st December 2004

I/We (iii): Friends of Dorset's Rights of Way (FoDRoW)

Of (iv): [redacted]

have made an application to the Dorset County Council that the Definitive Map and Statement for the area be modified by *:

Section C

(a) **Deleting** ~~the *footpath / bridleway / byway open to all traffic** which runs~~

from:

to:

(b) **Adding** the ~~*footpath / bridleway /*~~ *byway open to all traffic* * which runs

from: ST 49555 03010

to: ST 50150 02640

(c) **Upgrading/~~downgrading~~** to a ~~*footpath / bridleway*~~ */ byway open to all traffic** the ~~*footpath*~~ */ bridleway /* ~~*byway open to all traffic**~~ which runs

from: 1 – ST 49105 03415 2 – ST 50150 02640

to: 1 – ST 49555 03010 2 – ST 50485 02165

(d) ~~**Varying/adding to** the particulars relating to *the footpath / bridleway / byway open to all traffic** which runs~~

from:

to:

by providing that:

Signed: **Dated:** 21st December 2004

(i) Insert name of landowner(s)
(ii) Insert address of landowner(s)
(iii) Insert your name(s)
(iv) Insert your address
* Delete as appropriate

DORSET COUNTY COUNCIL

FORM C

CERTIFICATE OF SERVICE OF NOTICE OF APPLICATION FOR MODIFICATION ORDER

THE COUNTY OF DORSET DEFINITIVE MAP AND STATEMENT OF RIGHTS OF WAY

Wildlife and Countryside Act 1981

To: Chief Executive
Dorset County Council
County Hall
Colliton Park
DORCHESTER
Dorset
DT1 1XJ

I/We(i) Friends of Dorset's Rights of Way (FoDRoW)

of (ii) [redacted]

hereby certify that the requirements of paragraph 2 of Schedule 14 to the Wildlife and Countryside Act 1981 have been complied with in relation to the attached application.

Signed: _____ Date: 31st December 2004

NOTES FOR GUIDANCE

This certificate should only be completed when notice of the application has been served on all owners and occupiers affected by the proposal. A list of the names and addresses of all individuals notified should be provided below. Please indicate if you have been unable to identify all owners and occupiers of any land to which the application relates.

We have been unable to identify all landowners; the landowners identified are listed below and an application to post a Site Notice is enclosed.

Notice of Application Sent To:

	Name	Address
1.	[redacted]	
2.	[redacted]	
3.	[redacted]	
4.		
5.		

(i) Insert name of applicant(s) (ii) Insert address of applicant(s) 21 September 2004

DORSET COUNTY COUNCIL

FORM C

CERTIFICATE OF SERVICE OF NOTICE OF APPLICATION FOR MODIFICATION ORDER

THE COUNTY OF DORSET DEFINITIVE MAP AND STATEMENT OF RIGHTS OF WAY

Wildlife and Countryside Act 1981

To: Chief Executive
Dorset County Council
County Hall
Colliton Park
DORCHESTER
Dorset
DT1 1XJ

I/We(i) Friends of Dorset's Rights of Way (FoDRoW)

of (ii) [redacted]

hereby certify that the requirements of paragraph 2 of Schedule 14 to the Wildlife and Countryside Act 1981 have been complied with in relation to the attached application.

Signed: _____ Date: 6th February 2005

NOTES FOR GUIDANCE

This certificate should only be completed when notice of the application has been served on all owners and occupiers affected by the proposal. A list of the names and addresses of all individuals notified should be provided below. Please indicate if you have been unable to identify all owners and occupiers of any land to which the application relates.

Re: Beaminster BR17, BR35, "Crabb's Barn Lane. Unable to identify all landowners; site notices posted at ST 491 034 & ST 507 016 on 6th February 2005.

Notice of Application Sent To:

	Name	Address
1.	[redacted]	
2.		
3.		
4.		
5.		

(i) Insert name of applicant(s) (ii) Insert address of applicant(s) 21 September 2004

FORM D

DORSET COUNTY COUNCIL

APPLICATION FOR PERMISSION TO NOTIFY LANDOWNERS BY SITE NOTICE

Wildlife and Countryside Act 1981

To: Chief Executive
Dorset County Council
County Hall
Colliton Park
DORCHESTER
Dorset
DT1 1XJ

PATH LOCATION DETAILS:

PARISH: Beaminster **DISTRICT:** West Dorset

CLAIMED STATUS OF WAY: ~~Footpath/Bridleway~~/Byway Open to All Traffic *[delete as appropriate].*

DESCRIPTION OF PATH *[include a map]:*

FROM: ST 49105 03415

TO: ST 50700 01660

I/WE (i) Friends of Dorset's Rights of Way (FoDRoW)

of (ii) [redacted]

have carried out an investigation in an attempt to discover the owners and occupiers of the land affected by the application. I have made enquiries of: *[delete those that are not applicable].*

* Adjoining landowners
* Local inhabitants
* ~~Post Office~~
* ~~Parish Council~~
* ~~Register of Electors~~
* Land Registry
* Other appropriate sources *[please state]* – **Please see enclosed explanation.**

I have been unable to discover ownership of the land, and I request the Council to direct that Notice may be served by posting said Notices at either end of the way claimed.

Signed: _____ **Date:** 21st December 2004

DORSET COUNTY COUNCIL

FORM G

PUBLIC RIGHTS OF WAY DOCUMENTARY EVIDENCE CHECKLIST

Wildlife and Countryside Act 1981

To: **Chief Executive**
Dorset County Council
County Hall
Colliton Park
DORCHESTER
Dorset
DT1 1XJ

PATH DETAILS:-

PARISH: Beaminster **DISTRICT:** West Dorset

BELIEVED STATUS OF PATH: ~~**footpath / bridleway**~~ / byway open to all traffic *[delete as appropriate]*

DESCRIPTION OF PATH *[please indicate route on a map - 1:2500 scale if possible]*

FROM: ST 49105 03415

TO: ST 50700 01660

I/We (i) Friends of Dorset's Rights of Way (FoDRoW)

of (ii) [redacted]

have carried out research at the County Records Office and/or Public Records Office and wish the following documents to be considered in support of my application [see notes on reverse of **FORM A**]:

Document	**DRO/PRO Reference**
Please see enclosed report for full list of evidence submitted to support this claim	

Inclosure Award and Map*

Tithe Apportionment and Map*

Finance Act 1910 Maps*

Ordnance Survey Maps*

Railway/Canal Survey Maps and Schedules*

Estate Maps and Records*

Quarter Session Rolls*

Sale Catalogues*

Highway Board Minute Books*

Others [*please state*].

Signed: _____ **Date:** 21st December 2004

(i) Insert name of applicant(s) (ii) Insert address of applicant(s) * Delete as appropriate

Index to plans put in with application.

Byway Claim for Bridleways 17 & 35 Beaminster

Introduction

This document supports FoDRoW's DMMO claim for byway status on a route in the parish of Beaminster. The claimed route runs over what is currently two bridleways, an unpaved unclassified county road (UCR) and a section with no recorded public rights of way. The route extends from from ST 49105 03415 to ST 50700 01660. The entire route is highlighted on the enclosed map, which is an enlarged OS 1:50000 map printed at 1:20000 scale. This route is currently partly recorded as two bridleways, namely:

Beaminster BR17, ST 49105 03415 to ST 49555 03010.
Beaminster BR35 , ST 50150 02640 to ST 50485 02165.

No evidence has been found to indicate this road has ever been stopped up. Thus on the basis of the evidence presented below FoDRoW believes the route should today be a byway.

FoDRoW believes enough evidence is being submitted to justify this claim. Further evidence does exist and may be submitted at a later date. However, having considered the volume of claims likely to be submitted in the coming years this claim is being submitted now to avoid a future flood of claims when they are all fully researched.

Documentary Evidence

The following evidence is being submitted to support our DMMO application:

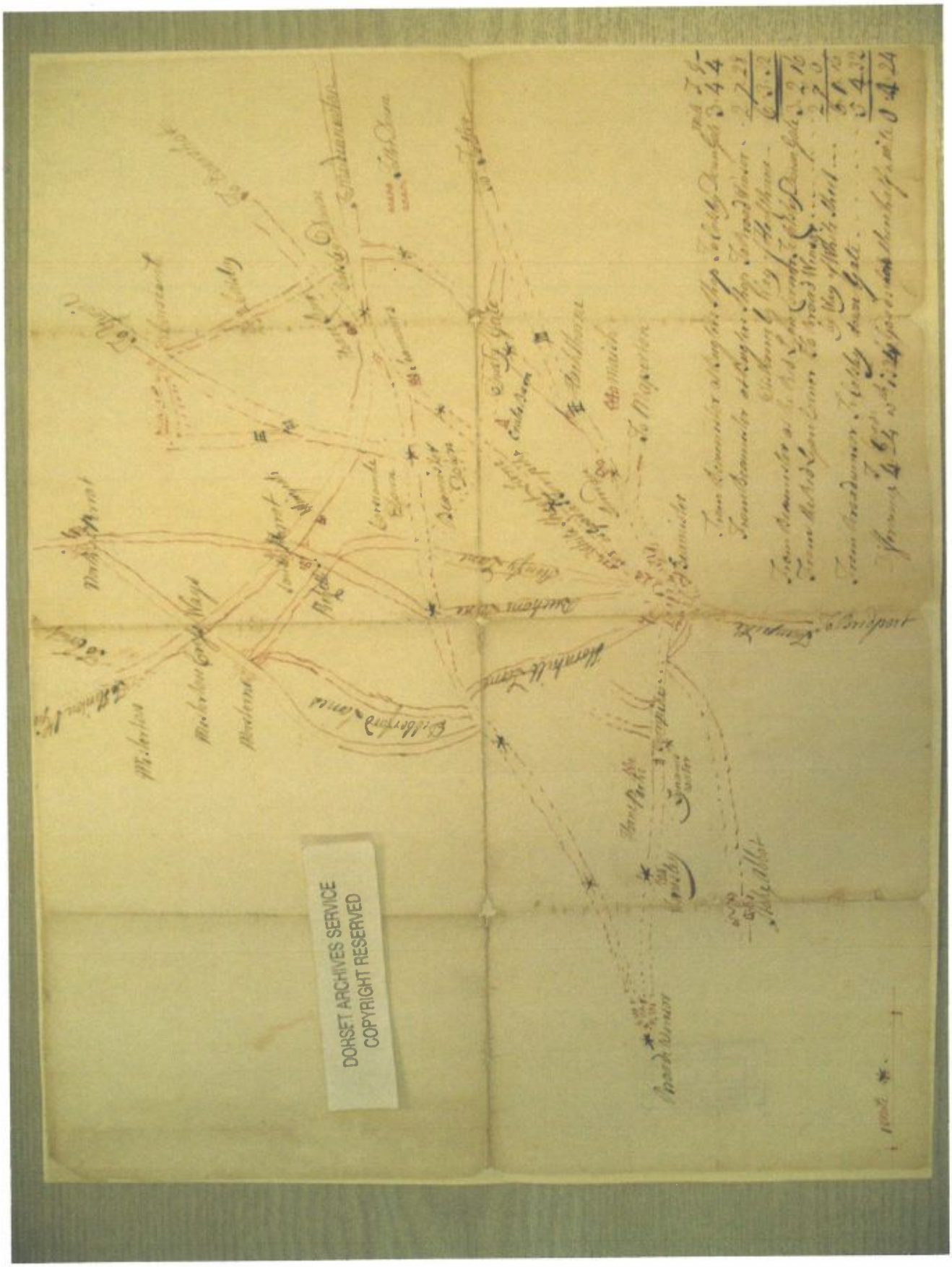
- Isaac Taylor Map 1796, DRO reference M14.
- Plan of roads in neighbourhood of Beaminster c.1800, DRO reference D/RGB:LL.
- Greenwood's map 1826, DRO reference M116.
- Beaminster Tithe map 1843, DRO reference T/BE.
- Beaminster Inclosure Map & award, DRO reference Inclosure 65.
- Ordnance Survey Old Series 1" map, DRO reference D626/25.
- Isaac Taylor's map 1765, DRO reference D626/25.

Analysis of Documentary Evidence

The evidence submitted indicates the claimed route is part of a longer route that historically had public vehicular rights. The original route started at ST 49105 03415, proceeded over BR17, then along the UCR, over BR35, over a section with no recorded public rights and along what is now a minor county road to Dirty Gate at its junction with the B3163, and over what is today an unpaved UCR on Hackthorn Hill. This claim covers the NE section of the original road, upto the point which is today a minor county road.

The Beaminster inclosure map and award identifies the central part of the claimed route as a public carriage road (PCR 'B'), thus this certainly had public vehicular rights. Furthermore, a map annotation at the south east end of the road describes the road as continuing "To Hook Village". This is confirmed by the description in the award which also states the road continues to Hook and it is sensible to assume the status of the road remained the same. The north east end of the road on

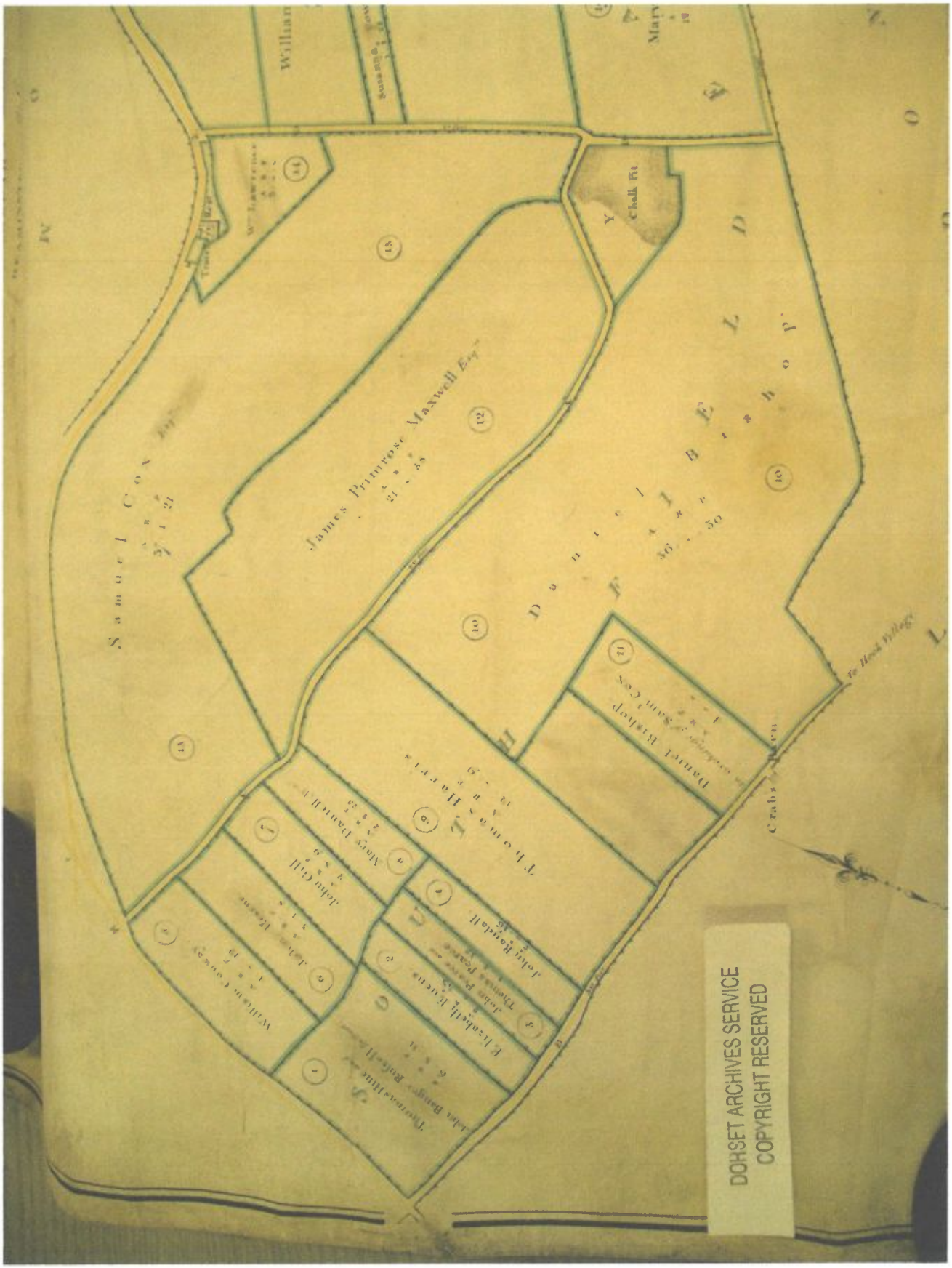

Mosterton
Winniards Gap
Cheddington
Halsto
Weston F.
Brook F.
Paper Mill
Ward
Little
Windsor
Downs
Pigott Chapel
Farm
Drompton
East Dibberford
Corscombe
West Dibberford
Beaminster Down
Down
Horn Hill
Broad Windsor
Mill
Hoar Stone
Longdon
Charlgall
Stoke Abbas
Mapperton
Comb Down



C.C.


SHERBORNE HD.
Batcombe
Chetnole
Bubb Down
Hilfield
Evershot
Frome
St. Quintin
Stoke
Row Hill

d.d.


James Primrose Maxwell Esq.
Samuel Cox
Daniel Bishop
Thomas Harris
Chalk Pit
DORSET ARCHIVES SERVICE
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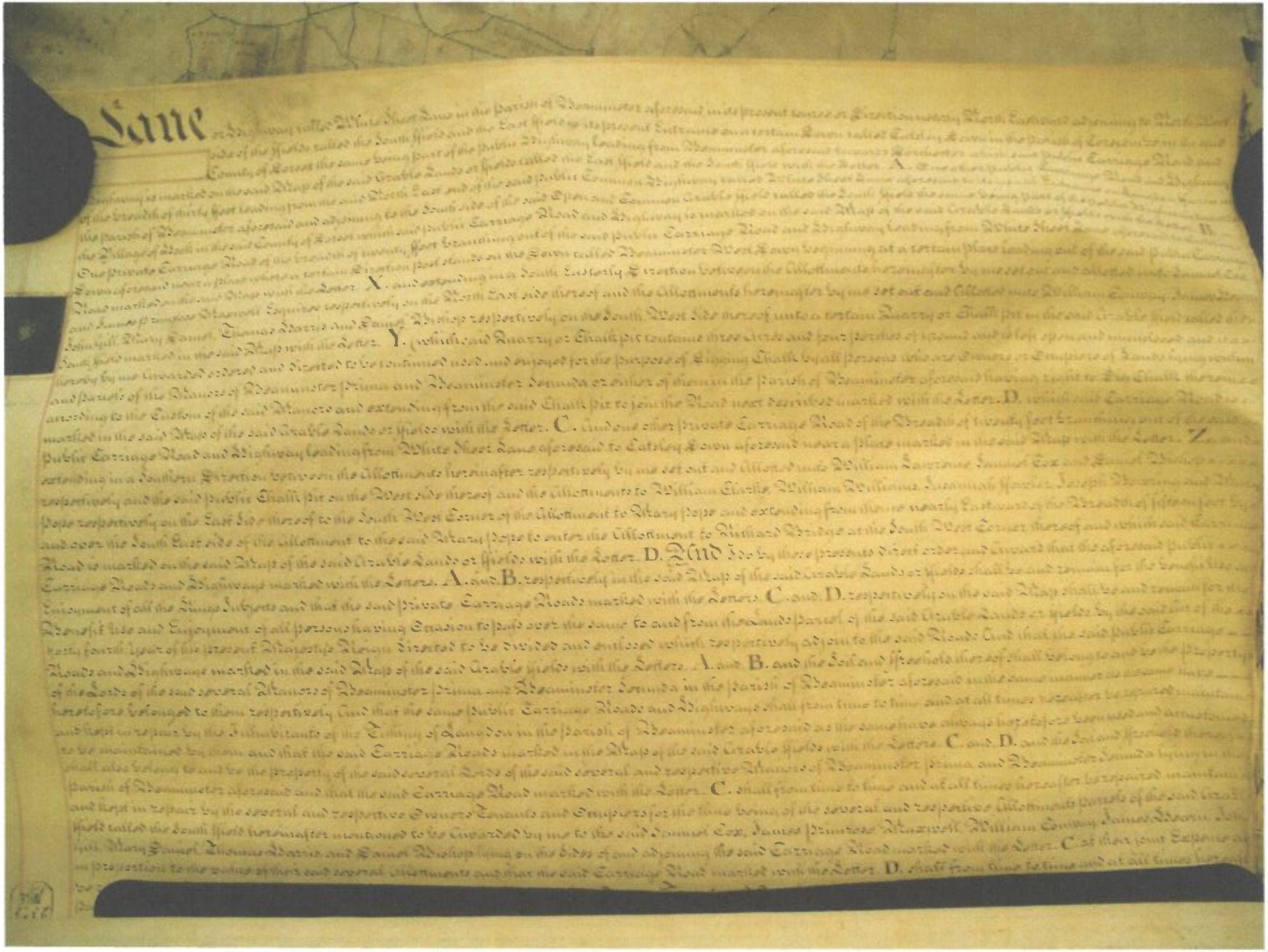
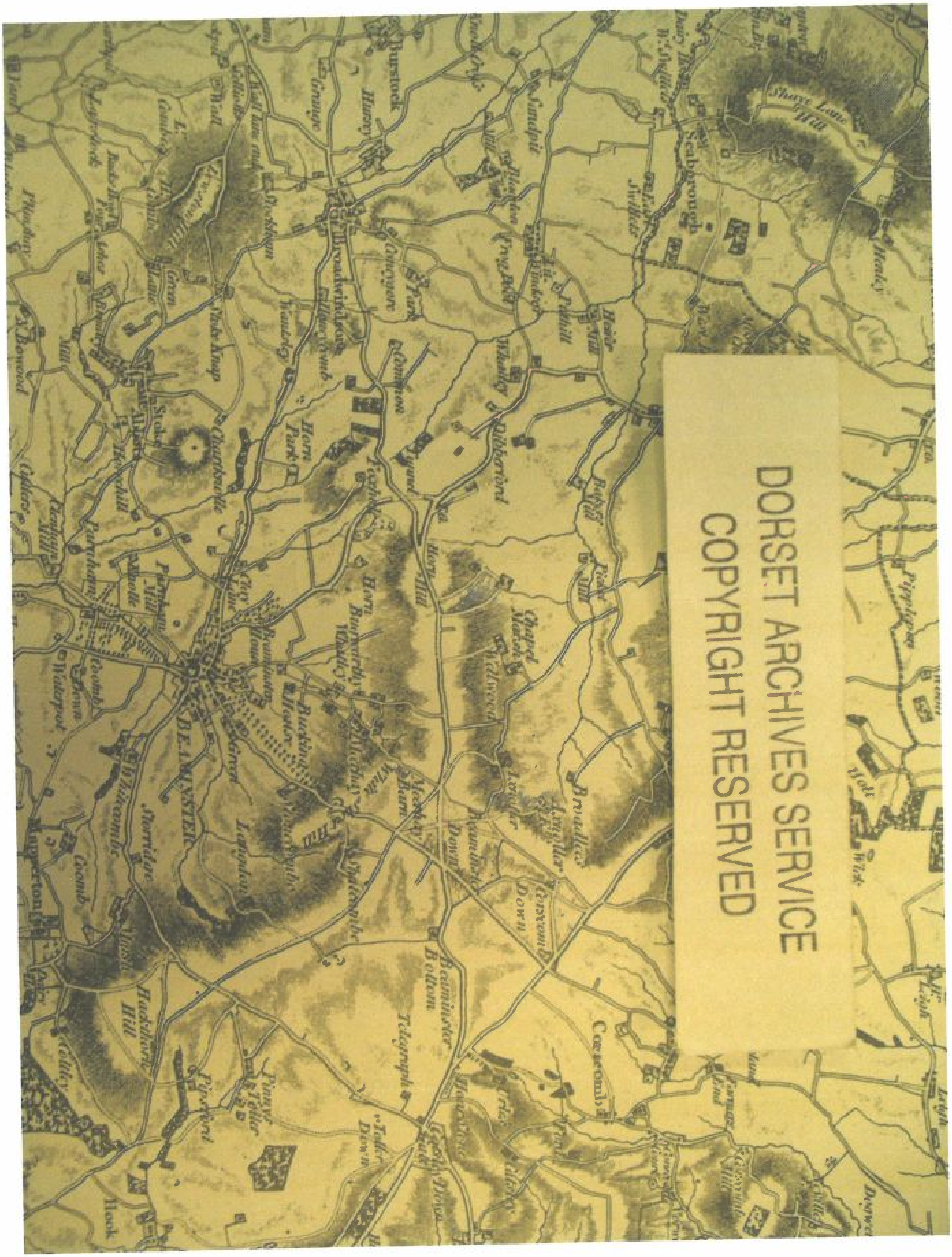


5.5.


DORSET ARCHIVES SERVICE
COPYRIGHT RESERVED
BEAMINSTER
Shaye Lane Hill
Seaborough
Broadwindsor
Burstock
Chapel Marsh
Hackthorn Hill
Telegraph
Beaminster Bottom
Corscombe
Storridge
Langdon
Pipplepen
Holt
Hook
Pinney
Stoke Knap
Netherbury

9.9.


Beaminster Down
Tumulus
Beaminster Bottom
Higher Northfield Farm
Westleaze Farm
Lake House Farm
White Sheet Hill
Hardy Way
Resr
Sprs
244
226
202
223
168
03

H

Byway Claim for Bridleways 17 & 35 Beaminster

Introduction

This document supports FoDRoW's DMMO claim for byway status on a route in the parish of Beaminster. The claimed route runs over what is currently two bridleways, an unpaved unclassified county road (UCR) and a section with no recorded public rights of way. The route extends from from ST 49105 03415 to ST 50700 01660. The entire route is highlighted on the enclosed map, which is an enlarged OS 1:50000 map printed at 1:20000 scale. This route is currently partly recorded as two bridleways, namely:

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Beaminster BR35 , ST 50150 02640 to ST 50485 02165.

No evidence has been found to indicate this road has ever been stopped up. Thus on the basis of the evidence presented below FoDRoW believes the route should today be a byway.

FoDRoW believes enough evidence is being submitted to justify this claim. Further evidence does exist and may be submitted at a later date. However, having considered the volume of claims likely to be submitted in the coming years this claim is being submitted now to avoid a future flood of claims when they are all fully researched.

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- Beaminster Tithe map 1843, DRO reference T/BE.
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- Isaac Taylor's map 1765, DRO reference D626/25.

Analysis of Documentary Evidence

The evidence submitted indicates the claimed route is part of a longer route that historically had public vehicular rights. The original route started at ST 49105 03415, proceeded over BR17, then along the UCR, over BR35, over a section with no recorded public rights and along what is now a minor county road to Dirty Gate at its junction with the B3163, and over what is today an unpaved UCR on Hackthorn Hill. This claim covers the NE section of the original road, upto the point which is today a minor county road.

The Beaminster inclosure map and award identifies the central part of the claimed route as a public carriage road (PCR 'B'), thus this certainly had public vehicular rights. Furthermore, a map annotation at the south east end of the road describes the road as continuing "To Hook Village". This is confirmed by the description in the award which also states the road continues to Hook and it is sensible to assume the status of the road remained the same. The north east end of the road on

the inclosure map shows a crossroads. This indicates the road continued NW beyond what is shown on the inclosure map.

The Beaminster tithe map shows the NE half of the claimed route as an unapportioned shaded road, indicating this was a public road. It includes much of the road shown on the inclosure map and all of the claimed route to the NE of the inclosure map's carriage road. Both parts of the road are shown in the same way and as continuous, thus supporting the argument that the route was continuous and the same rights, ie those documented in the inclosure award, would apply to the entire route.

Dorset Records Office document D/RGB:LL is a "Plan of roads in neighbourhood of Beaminster c. 1800". This clearly shows the claimed route as a continuous road. Although the map is a rough sketch the roads clearly correspond to modern roads. Furthermore the objective of the map's creator appears to be to show public roads with no lesser routes shown and the length of commonly travelled routes marked.

Isaac Taylor's map of 1796 clearly shows the entire route as a continuous road. There is no distinction between what is now the sections of BR, UCR and county road, indicating the route has a single status. This map also appears to only show public roads. Relatively few roads are shown, those included correspond well to modern public roads, and there appears to be no intention to show bridleways or footpaths.

Greenwood's map of 1826 also shows the entire claimed route as a continuous road with no indication the status changes at any point. The route's depiction is consistent with other minor public roads in the area. Similarly, The 1st Edition "Old Series" OS map and Isaac Taylor's map from 1765 both show the claimed route as a continuous road and in the same way as other public roads in the area. Issac Taylor's map shows very few roads and it appears only the more significant public roads are shown.

Finally, one must question why there be a public road to Higher Langdon, the modern county road from the B3163, when this is a private farm? It is more sensible to believe the road continued over what is today BR35 to join the unpaved UCR. In Dorset UCRs have the reputation of being public roads. This is confirmed by Dorset County Council letters and minutes from the 1950s and 1960s. Those document DCC's decision to not create RUPPs but instead classify unpaved roads with public vehicular rights as UCRs. The UCR in the claimed route goes nowhere and it is most likely the dead end UCR and county road were connected by a road over what is now BR35.

The inclosure map and award provides conclusive evidence of public vehicular rights over much of the claimed route. The tithe map and other small scale maps indicate the claimed route was a public road and also show it as a continuous route with the same status as the section shown on the inclosure map. The Eyre vs New Forest Highways Board case directs us that the whole route would have the same rights, ie those of a public carriage road, and there is no contrary evidence to assume the current BR-UCR-BR classification is correct.

Regulatory Committee

Dorset County Council

Date of Meeting	21 March 2019
Local Member(s): Cllr. Rebecca Knox, Member for Beaminster Lead Officer(s) Matthew Piles, Service Director, Environment, Infrastructure and Economy	
Subject of Report	Application for a definitive map and statement modification order to upgrade Bridleways 17 (Part), 35 and Crabb's Barn Lane, Beaminster, to a Byway Open to all Traffic.
Executive Summary	Following an application made in 2004 for a modification order in respect of the route that is the subject of this report, this report considers the evidence relating to the status of the route.
Impact Assessment:	Equalities Impact Assessment: An Equalities Impact Assessment is not a material consideration in considering this application.
	Use of Evidence: The applicant has submitted documentary evidence in support of this application. Documentary evidence has been researched from sources such as the Dorset History Centre, and the National Archives. A full consultation exercise was carried out in December 2009. A further consultation took place in 2018. These consultations involved landowners, user groups, local councils, other affected parties and those who had already contacted Dorset County Council regarding this application. In addition, notices explaining the application were erected on site. The County Councillor for Beaminster, Councillor Knox, and the Chair and vice-Chair of the Regulatory Committee, Councillor Jones and Councillor Phipps, were also consulted in 2018.
	Budget:

[redacted] of the Green Lanes Association	Has sent an email on 4 August 2018 to say that he has asked members of the Association to provide evidence of historical use of the way. However, no further information has been received.
[redacted] Secretary of the Dorset Group of the British Horse Society.	Has explained in a phone call in October 2018 and in an email on 8 January 2010 that the BHS does not have any information that assists with determining the status of the claimed path.
Natural England	Wrote on 14 January 2005 to say that they have no comment to make.
Ramblers Association	Wrote on 18 January 2005 with observations from the 1890, 1904 and 1901 Ordnance Survey maps, and from the nature of the network of highways and public paths in the area.

8 **Analysis of Documentary Evidence**

8.1 The documentary evidence that was submitted with the application is considered in paragraphs 8.2 to 8.10.

Ordnance Survey Map of 1811

8.2 The one inch Ordnance Survey 1st Series map of 1811 shows the claimed byway in the form of a lane or road.

Greenwood's Map of 1826

8.3 Greenwood's map of 1826 shows the claimed byway in the form of a lane or road, part of which may be unfenced. It is noted that other routes on Greenwood's map which form part of today's established highways network are shown in the same way. The map does not tell us whether use of the way was by the public or for private purposes, but it suggests a route that was in existence on the ground in the form of a road. The road is uncoloured on Greenwood's map, and is described in the key as a 'cross road'. This definition gives no clear indication as to the rights carried by the way. Greenwood's map of 1826shows the claimed byway in the form of a lane or road, part of which may be unfenced. It is noted that other routes on Greenwood's map which form part of today's established highways network are shown in the same way. The map does not tell us whether use of the way was by the public or for private purposes, but it suggests a route that was in existence on the ground in the form of a road. The road is uncoloured on Greenwood's map, and is described in the key as a 'cross road'. This definition gives no clear indication as to the rights carried by the way.

Taylor's Maps of 1765 and 1796

8.4 Taylor's map of 1796 appears to show the claimed byway. The map shows a lane or road running south-eastwards from Beaminster Down, and this route passes Crabbs Barn, which is noted on the map.

8.5 Taylor's map of 1765 also shows the route, as a double-pecked line, part of which is in the form of a lane.

8.6 These maps are of a small scale, and caution should be exercised in drawing conclusions from them. They do, however, confirm the existence of a way, of which there was presumably sufficient physical evidence to warrant its inclusion on the maps. In his submission [redacted] points out that many ways were shown on old maps which were not necessarily public vehicular ways or public ways of any kind. This has been noted in this report in discussing the validity of the showing of the claimed route on Ordnance Survey and other published maps, and in drawing conclusions from such information.

Plan of Roads in the Neighbourhood of Beaminster, *Circa* 1800

8.7 The applicant has supplied a sketch map of roads in the vicinity of Beaminster. The map shows part of the claimed byway as a double-pecked line. This indicates the existence of way of some kind on the route of the claimed byway, but caution should be exercised in assuming that this sketch map was a record of routes carrying vehicular rights [redacted] notes that many ways were shown on old maps which were not necessarily public vehicular ways or public ways of any kind.

Tithe Map of 1843

8.8 The tithe map of 1843 shows those parts of the claimed byway between A, B and C and between C-D-E, the latter corresponding to Crabbs Barn Lane, as land that was excluded from tithe. This suggests that the land the way occupied may have been considered to have been 'public' land. Highways were often excluded from tithe in this way. The remaining length of the route, between E, F, G, H and I, is not excluded. Between point I and Dirty Gate, the way is shown as excluded land. Between E and I there does not appear to be a path or track shown on the tithe map. The tithe apportionments for the enclosures through which the claimed byway runs between E and I do not make any reference to a highway or public way, but it was not part of the purpose of the apportionments to refer to highways. Those parts of the route between A, B and C and between C-D-E, and between I and Dirty Gate, are shown shaded in sienna on the tithe plan. It is noted that other routes on the tithe map are shaded sienna in this way, some of which are vehicular highways, but this does not confirm its status as a public road. Tithe maps were produced to record land for the purpose of tithe payments, and the showing of highways and ways carrying public rights was not a necessary part of their compilation. [redacted] points out that tithe maps were produced to show land that was titheable and croppable, and they were 'not aimed at defining the status of ways'. This has been noted in drawing conclusions from the information on the tithe map. Nonetheless, this record is useful in indicating that parts of the way in question may have been exempt from tithe because of its use as a public way of some kind.

Beaminster Inclosure Award of 1809.

8.9 The Inclosure Award of 1809 contains a plan showing a route which corresponds to Crabb's Barn Lane, between C and E on plan 18/13. The Award describes this way as 'one other public carriage road and highway 30 feet wide leading from the north-east end of White Sheet Lane to its usual entrance on Langdon Farm in the Parish of Beaminster and adjoining the south side of the said open and common arable fields called the South Fields the same being part of the public highway towards the village of Hook..." The Inclosure map is annotated with the words 'To Hook Village' at the south-eastern end of this awarded carriage road. There is no other plan contained in the Inclosure Award, and the remaining lengths of the claimed byway, between points A, B and C, and between E, F, G, H and I, are not included in the Award.

8.10 Consideration needs to be given to whether this awarded public carriage road was intended to carry public rights, and whether the award of the carriage road implies that those parts of the claimed byway not subject to the award also carried such public rights in forming continuous parts of the awarded route. With regard to the Inclosure Map, [redacted] view is that the words 'To Hook Village', indicating the way to the south-east, does not mean that public vehicular rights existed on that way. [redacted] notes that the Award confines the public carriage road and highway 30 feet wide to that length of path which corresponds to Crabbs Barn Lane, (shown between C and E on plan 18/13), that the words 'public carriage road' have to be interpreted in this context, and that 'it cannot have been a through route for the public in carriages.' [redacted] opinion is that the awarded way was a wheeled vehicular road for local people needing to get to Crabbs Barn Lane, rather than a carriage road for the public at large, and that the reference in the Award to the carriage road forming 'part of the public highway towards the village of Hook' does not imply that the 'highway' was also a public carriage road. [redacted] Maintains that the confining of the awarded carriage road to Crabbs Barn Lane, and the absence of an award over the remaining length of the claimed byway, places a limitation on the value of the inclosure award in determining the extent of public rights over the claimed byway. Officer Comments: The awarded way gave access to Crabbs Barn, and, if the carriageway terminated at that point, it could be that it was intended for those persons who, for whatever reason, had cause to go from Whitesheet Hill to Crabbs Barn. If this was so, the meaning of 'public' in this context may not extend beyond those people. The words 'to Hook Village' on the Inclosure Plan, and the description of a 'public highway towards the village of Hook' in the Award, give weight to the assumption that the awarded carriageway was part of a route which continued, south-eastwards, in the direction of Hook. Whilst this assumption can be made with some degree of confidence, the value of the Inclosure Award in providing evidence of public status is confined to that length of the claimed route that is awarded by it.

8.11 Officers consider that the above evidence, which has been submitted in support of the application, raises a prima facia case that the claimed public rights exist. Accordingly, the exemptions in section 67 of the Natural Environment and Rural Communities Act 2006 do not apply. Officers have also considered other documentary evidence, which was not submitted with the application. This evidence is discussed below.

The Definitive Map

Parish Surveys

8.12 The National Parks and Access to the Countryside Act 1949 charged the County Council, in its capacity of "Surveying Authority", with a duty to compile a record of the public rights of way network. As part of this process District and Parish Council carried out surveys and provided the County Council with information for the purposes of recording the existence of public rights of way.

8.13 There were various maps produced by the County Council leading up to the current definitive map, which was sealed in 1989. These were the draft map of 1953, provisional map of 1964, first definitive map of 1966 and the revised draft map of 1974.

8.14 The parish survey map, of 1951 shows the whole length of the claimed byway as a solid green line denoting a bridleway. On the parish map the path has the number 30 where it corresponds to what is now Bridleway 17, and the whole length of the route between the north-western end of Crabbs Barn Lane has the number 58.

8.15 The parish survey describes path 30 thus:

'BR 30 On Beaminster Down. This BR starts at the southern corner of Beaminster down (Jn of Crabbs Barn Lane and White Sheet Hill Road) and runs in an NW direction with hedge on left to the westerly corner of down. A well defined track.'

8.16 The parish survey describes path 58 thus:

'BR58 Beaminster down towards Hooke. A continuation of BR30 from the southern corner of Beaminster Down. For the first half mile this BR is known as Crabbs Barn Lane. It runs between hedges (part metalled) in a SE direction to a FG and then continues as a field track with hedges on left using two FG's (passing turning on left to Upper Langdon (see BR59) and turnings on right to Longdon (see BR22, 57 and 56), then second FG being at the commencement of a lane (12 foot, metalled) which continues to Dirty Gate (Top of Hackthorn Hill on Beaminster-Dorchester Road). A well defined and frequently used BR with gates in good condition.'

Draft Map 1953.

8.17 The draft map of 1953 shows the whole length of the claimed byway as a solid green line denoting a bridleway. On the map the path has the number 30 where it corresponds to what is now Bridleway 17, and the whole length of the route between the north-western end of Crabbs Barn Lane has the number 58.

Provisional Map 1964

8.18 The provisional map of 1964 shows the north-western end of the claimed path as a bridleway, numbered 17, which corresponds to the present line of Bridleway 17 between points A, B and C on plan 18/13. The provisional map shows Bridleway 35 running between points E and F; that is, between the access road to Higher Langdon Farm and Bridleway 33, at point E, and the present north western end of Bridleway 35 at its junction with the publicly maintainable highway at point F.

First Definitive Map 1966

8.19 The First Definitive map shows the same detail in respect of the claimed byway as the provisional map of 1964.

Revised Draft Map 1974

8.20 The revised draft map of 1974 shows the north-western end of the claimed path as a bridleway, numbered 17, which corresponds with the present line of Bridleway 17 between points A, B and C. On the revised draft map, however, Bridleway 35 is not shown. The revised draft map does show any public rights of way over the route between C and Dirty Gate. Given that a number of public rights of way shown on the Revised Draft map, Footpath 28 and Bridleways 33 and 34, join the way shown on the Ordnance Survey base map between C and Dirty Gate, the assumption must be that this way carried public rights. Given that it was not deemed appropriate to record these rights on the revised draft map, it seems likely that it was considered that they were vehicular rights that did not require recording on the definitive map.

Special Review. 1977/1973

8.21 The Council's files contain a form, included in correspondence with the definitive map, entitled 'Dorset County Council Special Review of Definitive map of Public Rights of Way, which proposed that the way should be recorded as a byway open to all traffic. The description of the path in this form is similar to that of the awarded carriage road in the Inclosure Award of 1809. There is a reference on the form to the route being a Road Used as Public Path (RUPP). The committee's decision was that the route 'should be shown as a county road because of its origin in the Inclosure Award.' There does not appear to have been any further correspondence or submission of other evidence to back-up the proposal that the way should be recorded as a byway open to all traffic.

Sealed definitive map. 1989

8.22 The sealed definitive map of 1989 shows the north-western end of the claimed byway, between points A, B and C as a bridleway, numbered 17. Between points E and F the path is shown as a bridleway, numbered 35. The remaining length of the claimed byway are not shown. [redacted] notes that there has been no challenge to the recorded status of the ways included in the application for the modification order during the process of the drawing up and review of the definitive map. [redacted] refers to the original definitive statement, which described the length of the route between C and F on plan 18/13 as a bridleway; this included Crabbs Barn Lane, which is not recorded on the current definitive map, as well as the length of what is now Bridleway 35.

Highways Records

8.23 Part of the claimed byway is shown in Dorset County Council current records as a highway maintainable at public expense. The length of Crabbs Barn Lane between points C, D and E on plan 18/13, is shown as publicly maintainable highway. The length of way between point I and Dirty Gate is also shown in these records as publicly maintainable highway. The records of preceding highway authorities are not available, and may have been destroyed. It is important to note that these records do not confirm the extent of public rights which exist over a way shown in them. Their purpose is to list highways which the County Council has a responsibility to maintain. Notwithstanding this, it is a matter of fact that the majority of ways shown in councils' records of maintainable highways carry public vehicular rights.

Finance Act 1910 Records
Valuation Map and Field Book

8.24 The Finance Act 1910 survey map shows the length of claimed byway between A, B and C, over Bridleway 17, to run within hereditament 495. The Field Book for this hereditament does not record any deduction for 'Public Right of Way or User'. There is nothing in the Field Book that makes reference to a highway over this part of the claimed path. The length of claimed byway over the part of Crabbs Barn Lane between C and a point to the north-west of D is shown as a strip of land that was separate from the adjacent hereditaments, and this is suggestive of highway status. Highways were often excluded in this way as land that was not subject to taxation. The south-eastern end of Crabb's Barn Lane is not shown to be excluded in this way, and lies within hereditament 304. The Field Book for hereditament 304 does not record any deduction for 'Public Right of Way or User.' The length of claimed byway between E, F, G, H and I lies within hereditament 342, and is not shown to be excluded as a separate area of land. The Field Book records a deduction of £100 for 'Public Right of Way or User'. It is possible that this deduction was granted because of the existence of a highway through the land subject to the survey. A number of public rights of way cross the area of land included in hereditament 342, and it cannot be concluded that this deduction relates solely to the claimed byway. [redacted] has drawn attention to the sum of £100 which was deducted for 'pubic right of way or user; in respect of hereditament no.342, relating to Langdon estate, and argues that 'a claim of only £100 over 512 acres is on the low side', and that various footpaths traverse the farm.

Ordnance Survey Maps

8.25 The 1 inch Ordnance Survey 1st Series map of 1811 is noted in 8.1 above. It shows the claimed byway in the form of a lane or road.

8.26 The 1888 6inch Ordnance Survey map shows that part of the claimed byway between A and C in the form of a lane. Between C and E the path runs within a lane, Crabbs Barn Lane, Between E and H the path appears to be a track that is unfenced on its southern side. It then continues as a lane to point I and onwards to Dirty Gate.

8.27 The 25 inch Ordnance Survey map of 1903 shows the shows the part of the claimed byway between A and C in the form of a track. Between C and E it is shown as a lane, which is Crabb's Barn Lane. Between E and H the path appears as a track that is unfenced on its southern side. The way then continues as a lane to point I, and onwards in the same way to the road at Dirty Gate.

8.28 The 1904 6 inch Ordnance Survey map shows similar detail to the 1888 map. On the 1901 map the north-western end of the path, between points A and B, appears to be unfenced on its northern side, and the boundary has been removed.

8.29 The 1 inch Ordnance Survey map of 1906 shows parts of the claimed route as a 'Third Class Road'. The route between C and I is shown partly in the form of a lane and partly as a track or unfenced road. The north-western end of the path, where it runs over Bridleway 17 between A, B and C, is not shown.

8.30 The quarter-inch Ordnance Survey map, of1934, shows the part of the claimed byway between C and I as a lane or road, and this is described in the key as an 'Other Metalled Road.' The north-western end of the path, where it runs over Bridleway 17 between A, B and C, is not shown.

8.31 The 1958 two and a half inch OS map shows the greater part of the route as a lane. A short section to the north of point G appears to be unfenced on the southern side.

8.32 It is important to note that Ordnance Survey maps do not provide any indication of the status of a route. They are of use in that they confirm the physical existence of what was on the ground at the time of the survey.

8.33 The limitations of Ordnance Survey maps in providing evidence of the status of a way is thus noted. [redacted] alludes to this, and emphasizes, with particular reference to the second edition 25 inch OS map published in 1903, the contrast between the nature of Crabbs Barn lane and the remaining parts of the claimed byway. [redacted] believes that this adds weight to the existence of Crabb's Barn Lane as 'an accommodation way serving the fields surrounding it. 'The 1903 OS map appears to indicate the presence of numerous gates across the claimed byway, which [redacted] believes argues against its use as a public highway for vehicles.

Early Published Maps

8.34 A number of early published maps have been examined, in addition to those submitted by the applicant, including Saxton's map of 1575, Kip's map of 1607, Bill's map of 1626, Blaue's map of 1645 and Seale's map of 1732. None of these shows the claimed byway, but the maps are of a small scale and only show settlements and significant topographical features.

Commercial Maps

8.35 There are a number of other commercial maps published mainly in the first half of the 20th century which shop the existence of a way on the route of the claimed byway. They do not confirm the status of this way, but in some cases suggest that this route was available for use by vehicles.

Land Registry

8.36 Land Registry documentation does not assist in determining the status of the claimed byway. The north-western end of the path, shown between points A, B, and C on plan 18/13, is included within an area of land that is registered. The land occupied by the remaining length of claimed byway, between C, D, E, F, G, H and I is unregistered. It does not follow that this land is unregistered because of its status as a public way of some kind.

9 **Analysis of User Evidence Supporting the Application**

9.1 A total of 22 users have completed user evidence forms, which were submitted in support of the application. These forms are dated in 2008, 2009 and 2010.

9.2 A summary of the forms of evidence is set out below, but reference should be made to the actual forms contained within the case file Ref.T354 for all the information. The table at appendix 4 summaries the key information contained in these forms.

9.3 Not all witnesses have been personally interviewed. The information has been taken from the forms of evidence which have been signed by each witness stating: "I hereby certify that to the best of my knowledge and belief the facts that I have stated are true".

9.4 With the exception of three forms, a typed note on each user evidence form describes the route referred to in the form as Route described on form as running from 'County road junction at ST4958 0299 south of Higher Northfield Farm to old crossroads at Dirty Gate at ST 5092 0125 (Route known locally as Crabb's Barn Lane'. The three remaining forms (from [redacted], [redacted] and [redacted]) give the route as running between ST4960 0298 and ST 5093 0124. The maps accompanying the forms indicate that the route referred to runs between point C and Dirty Gate. None of the forms give any information or indication that the witness has used the length of path to the north-west of point C, between A, B and C on plan 18/13.

9.5 Section 31 of the Highways Act 1980 provides that where a way has been enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it. The 20 year period applies retrospectively from the date on which the right of the public to use the way was brought into question.

9.6 The date of the application for the modification order is 21 December 2004. There are no references in any of the user evidence forms to the witnesses use of the path being brought into question during the time they have used it. In assessing the extent to which use of the path by the public might have established a public footpath statements testifying to use of the path may therefore refer to use of it up to 2004 in order to meet the requirements of section 31.

9.7 The minimum period of use for the purposes of dedication under Section 31 of the Highways Act 1980 is thus taken to be from 1984 to 2004.

9.8 The statements contained in the user evidence forms indicate that the use referred to was by vehicles, on motorcycles. The period of use recorded in the forms was between 1973 and 2010; this amounts to 31 years up to 2004.

9.9 Of the 22 witnesses who claim to have used the route, one had used the route for 31 years, three for between 20 and 30 years, ten for between 10 and 20 years, and 6 for between 1 and ten years. These statements show that there was continuous use of the way by motor vehicles between 1973 and 2004. Two of the users have noted that their use of the path did not commence until 2004.

9.10 The frequency of use varied from once or twice a year to a maximum of 20 to 25 times a year.

9.11 None of the witnesses had asked for permission to use the path. None make a statement to the effect that they were granted permission to use the claimed footpath.

9.12 No witness refers to any signs or notices on the claimed path that were intended to discourage their use of it in motor vehicles.

9.13 None of the witnesses mention their use of the path being in the exercise of a private right of access.

9.14 No one was a tenant or employee of the owner of the land.

9.15 None of the witnesses recall there being any gates along the route that were locked, or refers to any other obstructions that would have prevented their use of the way.

9.16 All of the witnesses mention meeting or seeing other users of the way and a number give their opinion that the landowner(s) would have been aware of their use of the way due to the visibility of tyre tracks on the ground.

9.17 The majority of the witnesses state that they saw or met other users on their motorcycles, but several also refer to seeing others on bicycles, horses or on foot. One refers to use by another person or people with a four-wheel drive vehicle. [redacted] has made comments with regard to user evidence, although the user evidence that is considered in this report had not been sent to the Council at the time of [redacted] submission in 2005. [redacted] notes that a request for information by the County Surveyor in 1971 (see section 11 below) did not reveal any evidence of public use. [redacted] makes the point that the route between Point C at Whitesheet Hill and Dirty Gate 'is subject to public vehicular use very infrequently, probably no more than once or twice a year at most.' [redacted] explains that whenever the objectors see anyone attempting to use the route, they challenge them by 'pointing out that it is not a through-route for vehicles, and the visitor then leaves.' When Landgon (Dorset) Farms owned Beaminster Down, they pursued the same policy. On one occasion, about 15 years ago, permission was given for a motorcycle club to use the route as part of a rally. [redacted] emphasises that in relation to the A-B-C stretch there is 'no evidence of public vehicular use at all', and this has been confirmed by the tenant and farm manager, who would have 'immediately challenged' any attempt to use this section with a vehicle.' [redacted] point here is that 'This evidence of challenges is good evidence of the lack of intention to dedicate.' Officer Comments: This must be considered alongside the statements of those who have completed the user evidence forms in support of this application. None of the witnesses refers to having been challenged whilst using the route, and there are no references to any attempts to deter them from using the way. There is, however, no user evidence with regard to the A-B-C stretch, which adds weight to [redacted] assertion that this length of the claimed byway has not been used by motor vehicles.

9.18 [redacted] refers to the case of *Bakewell*,(2004). The background to that case was that before it, the Courts had held that long use by vehicles of a footpath or bridleway would not create public vehicular rights because it is a criminal offence to use a motor vehicle on a footpath or bridleway without lawful authority. The House of Lords in Bakewell reversed that line of cases and held that long use by vehicles could create public rights if that use did not cause a nuisance to footpath or bridleway users. [redacted] argues that in the present case use by motor vehicles would have been a nuisance to lawful users of the way on horseback. [redacted] suggests that use of mechanically propelled vehicles on a bridleway may constitute the common law offence of public nuisance if that use prevents the convenient use of the way by lawful

users. [redacted] also submits that in order to fall within the decision, there had to be someone with capacity to dedicate the route which is not the case if the land is leased, He points out that 'it is clear that capacity to dedicate rests in the hands of the freeholder who also occupies the land crossed by the way in question, so that in the present case all the time the farm was the subject of a tenancy, no dedication could have taken place.' [redacted] refers to the tenancy of [redacted] concerning the land at Beaminster Down crossed by the claimed byway between points A, B and C. [redacted] also maintains that the land crossed by the length of the route between E and I was subject to a tenancy, and refers to the Finance Act Valuation Book entry for hereditament 342 which makes reference to the occupation of the land by a tenant.

9.19 The relevance of this is that, if vehicular use would have caused a nuisance or the owner did not have the capacity to make a dedication, evidence of use of the way by motor vehicles could not be considered in determining whether public vehicular rights had been established. If this is so, any evidence of use of the way by the public with vehicles after 1930 could not be taken into account.

9.20 The existence of a tenancy does not prevent a deemed dedication under section 31 of the Highways Act. It may though prevent an implied dedication under common law. For a common law dedication, the landowner must have the capacity to dedicate, but this need not be throughout the whole period of the use of the way by the public. Any periods of capacity, however short, may be sufficient for dedication to be implied. There is no evidence that the landowner acquiesced in dedication of the route; there is, equally, no evidence that they did not.

9.21 Part of the land has been leased to [redacted] since 1986. The area of land subject to [redacted] tenancy contains the section of claimed byway between points A, B and C on plan 18/13. As noted above, there is no user evidence in support of the existence of vehicular rights over this section of the claimed byway. Nonetheless, any lack of intention or capacity to dedicate the way would not affect any pre-existing public rights, vehicular or otherwise, over the claimed byway.

9.22 It would not have been open to the landowner to dedicate the way as a vehicular highway if use by vehicles would have constituted a public nuisance to lawful users of the way. [redacted] argues that use of the route by motor vehicles would have been a nuisance to lawful users of the way on horseback, and that such use may constitute the common law offence of public nuisance in that it prevents the convenient use of the way by lawful users. Due to the physical characteristics of the route, officers do not consider the public vehicular use would have constituted a nuisance. Many routes of a similar physical nature carry public vehicular rights and there are no exceptional circumstances that might apply in the case of the claimed byway presently under consideration.

9.23 [redacted] has supplied a plan dated June 1951 from deeds relating to Beaminster Down. The plan shows the sections of path A-B-C and C-E in green, which are described as bridleways. [redacted] makes reference to *Godmanchester Town Council and Drain v DEFRA, 2004,* and points out that a provision in a written tenancy agreement by which the landlord obliges the tenant to prevent trespass and the acquisition of public rights of way is good evidence of his lack of intention to dedicate. Officer Comments: The 'Godmanchester' case was appealed to the House of Lords where it was had that in order for a provision such as the one in this case to show a lack of intention to dedicate a highway it must be draw to the public's attention. There is no evidence that it was.

9.24 A byway open to all traffic is a right of way for vehicles. The definition of a BOAT is that of a right of way for vehicular traffic, but which is used mainly for the purposes for which footpaths and bridleways are used; that is to say by walkers and horse riders.

9.25 In this case it may be considered that the number of users, their frequency of use and the level of that use would be sufficient to raise a presumption of dedication of public vehicular rights over the length of the route shown on plan 18/13 between Whitesheet Hill, point C, and Dirty Gate.

10 Analysis of evidence in support of the application

10.1 On 15 September 2006 [redacted] submitted the documentary evidence listed in the table in 5.1 above.

10.2 [redacted] concludes by stating that, 'In summary, there is a weight of evidence to indicate that it is more likely this route carries public carriageway rights than any lesser rights.' 'I believe there is sufficient evidence, together with the evidence put forward by FoDRoW, to support the claim that this road carries vehicular rights and should therefore be correctly classified as a byway open to all traffic.'

10.3 The applicant's comments on the evidence he submitted have been taken into account in section 8 of this report in considering documentary evidence which relates to the status of the claimed byway.

10.4 [redacted] of the Open Spaces Society has written in a note dated 1 February 2010 making a number of observations on the background and historical purposes of the claimed route. [redacted] says that 'in 1950 local people assumed it was already...an unclassified road', which [redacted] believes is the reason for the unrecorded status of parts of the claimed byway. [redacted] refers to the showing of the way on a road map from the 1970's and explains that the route was a 'direct link in the ridgeway system.' [redacted] refers to 'A History of Beaminster', published in 1984 by Marie G de Eadle, who writes that 'authority was given for the building of a turnpike house near Dirty Gate in order to block use of Crabbs Barn Lane in order to avoid tolls, but adds that it was never built. In other references, Mrs De Eadle refers to the was as a droveway.'

10.5 These points must be considered together with documentary evidence relating to the use of and status of the way.

11 Analysis of evidence opposing the application

11.1 In a letter dated 6 August 2018 [redacted] on behalf of the Green Lanes Protection Group, has objected to a modification order on the grounds that 'although the application for the modification order was made on 21 December 2004 it was not lodged with the County Council until 6 February 2005. It was thus after the cut-off date on 20 January 2005 and does not benefit by way of section 67(3) of the Natural Environment and Rural Communities Act 2006'.

11.2 In order for unrecorded rights for mechanically propelled to be preserved, an application complying with the requirements of the Wildlife and Countryside Act 1981 had to be made before 20 January 2005.

11.3 [redacted] submits that the applicant's statement in the application:

'FoDRoW believes that enough evidence is being submitted to justify this claim. Further evidence does exist and may be submitted at a later date. However, having considered the volume of claims likely to be submitted in the coming years this claim is being submitted now to avoid a future flood of claims when they are all fully researched.'

means that not all evidence was submitted that the applicant wished to rely on. So, even if the application was not too late, it would not he submits comply with the legislative requirements to record a byway. [redacted] has obtained Counsels' opinion which says that an applicant who deliberately holds back evidence or applies before completing their research will not comply with the legislation. He submits that following Court decisions, the legislative requirements must be met strictly in order to preserve rights for mechanically propelled vehicles.

11.4 The County Council has considered these points raised by [redacted] The application was received by the County Council on 25th September 2004, and so before 20 January 2005. All of the evidence list on the form was supplied by the applicant prior to the application. The applicant used the same wording for each of its application submitted around this time because it was known that there was likely to be a 'cut off' date but not when it would be. Officers do not consider that the applicant deliberately held back evidence or submitted applications before they had been researched. Officers are therefore satisfied that the application has been submitted in accordance with the requirements of the Wildlife and Countryside Act 1981 so that the exceptions in the Natural Environment and Rural Communities Act are capable of applying.

11.5 On 21 July 2005 [redacted] of Thring Townsend, Solicitors, sent to the Council a detailed submission inviting the Council to 'dismiss the claim and make no order'. This submission contains documentary evidence and other information regarding the status and use of the path in question, and an analysis of the evidence that has been submitted in support of the application. [redacted] is acting for the following:

- [redacted]
- [redacted]
- [redacted]

The issues raised by [redacted] in this submission are discussed below.

11.6 [redacted] questions whether it is technically possible for 'two parts of the claimed route to be modified to byway status if it is the case that either or both of these is already a publicly maintainable road'.

11.7 The effect of a modification order would be to record the route in question as a byway open to all traffic on the definitive map. There is no reason why the way should not appear in the Council's records as both a publicly maintainable highway and a byway open to all traffic.

11.8 [redacted] notes that, if the application for the recording of a byway open to all traffic is to succeed, 'the standard of proof is on the balance of probabilities. It is not a question of whether or not public vehicular rights have been reasonably alleged to subsist.'

11.9 Where the addition of a right of way is being considered, in order to make an order, the surveying authority must be satisfied that the evidence shows on the balance of probabilities that the right of way exists, or has been reasonably alleged to exist (section 53 (3) (c) (i)) and where the upgrading is being considered the surveying authority must be satisfied that the evidence shows on the balance of probabilities a highway shown of a particular description ought to be there shown as a highway of a different description. (section 53 (3) (c)) (ii)). [redacted] observation in that different tests of standards of proof must therefore be applied in considering the evidence relating to those parts of the claimed route which are recorded on the definitive map (that is, Bridleways 17 and 35) and that over the remaining, unrecorded, parts of the way, is correct. To confirm an order to add a right of way, the evidence must show that the rights of way exists (not only that it is reasonable alleged to exist).

11.10 [redacted] says that if a route is presumed to be dedicated under section 31 of the Highways Act or at common law, it must be accepted and used by the public as of right with vehicles. He also says that vehicular use exercising a private right of way is not public use. Officer Comments: [redacted] is correct in that both dedication and acceptance are required. Where there is a presumed dedication based on use of the route, the evidence of that use can be evidence of acceptance by the public. Evidence of use by those exercising a private right of way does not count as evidence of either a presumed dedication or of acceptance by the public.

11.11 [redacted] has supplied a copy of a plan of 1907 in respect of the Langdon Estate. This is based on the 1903 Ordnance Survey map, which is discussed above. The northern boundary of the estate is drawn across the south-eastern end of Crabbs Barn Lane, at point E on plan 18/13. [redacted] refers to the 'wide double-fenced area' which contains Crabbs Barn Lane, terminating at this point, and how the claimed byway continues south-eastwards as an unfenced track or path within the fields. [redacted] assertion is that 'these two contrasting ways when viewed together in this way do not give the impression of the whole being a through route, certainly not at least for motor vehicles.'

11.12 Officer Comments: As has been noted, Ordnance Survey maps do not provide any indication of the status of a route but show what was on the ground at the time of the survey. [redacted] observation that the width of the track shown on the OS map as it enters the field is 'less than a quarter of the width of the gateway at the end of Crabbs Barn Lane' does not provide any substantial evidence that the unfenced track to the south-east was not used, or could not be used, by motor vehicles. The track within the field was unfenced and there is no indication on the map that there was anything to constrict its use by vehicles. It is noted too that a track of similar width as that running in the field is also depicted on the map within the enclosed area of Crabb's Barn Lane itself. The double-pecked line representing a track is no more than an indication of a worn path on the ground.

11.13 [redacted] has supplied copies of plans contained in conveyances of 1925 and 1939 relating to the Langdon Estate. These plans show the claimed byway as it passes through the estate, partly in the form of a walled or fenced lane, and partly as dashed line, in the form of a track or path. [redacted] has also referred to a 1980 conveyance in which Higher Langdon was split from Langdon Farm, and explains that the title to Higher Langdon 'also includes the express grant of private access rights on the Claimed Route.' [redacted] has expressed his view that 'If the Claimed Route as a whole had historically been dedicated to the public use with motor vehicles, it is highly unlikely that the central section would have been within private ownership and occupation and been the subject of detailed provision as to private access and repair.'

11.14 It is indeed possible that, had the way in question carried vehicular rights, there may have been no requirement for a conveyance providing for such private use and maintenance. Nonetheless, routes carrying public rights of all kinds commonly pass over private land, and a landowner may transfer land subject to whatever conditions they think fit. It cannot be asserted with any degree of confidence that private provision for the use and maintenance of the way was due to the absence of public rights over it.

11.15 [redacted] has supplied a plan dated June 1951 from deeds relating to Beaminster Down. The plan shows the sections of path A-B-C and C-E in green, which are described as bridleways. [redacted] makes reference to *Godmanchester Town Council and Drain v DEFRA, 2004,* and points out that a provision in a written tenancy agreement by which the landlord obliges the tenant to prevent trespass and the acquisition of public rights of way is good evidence of his lack of intention to dedicate. The implications of the existence of any tenancies is discussed elsewhere.

11.16 [redacted] makes reference to the various classifications of highway which lie over the route of the claimed byway and asserts that this suggests the absence of public vehicular rights throughout the route rather than the presence of such rights. Two parts of the route are recorded as public bridleway, one part carries no recorded public rights, and part of it is shown in the County Council's records as an unclassified county road (UCR). [redacted] points out, correctly, that the showing of a way as a UCR in these records does not confirm the extent of public rights over it. Records of unclassified highways are kept by highway authorities for purposes relating to a way shown therein, but they are not a legal record of public rights. The records of the preceding highway authority are not available.

11.17 [redacted] describes the topography of the claimed route and makes several observations. The name 'Crabb's Barn Lane', the fenced nature of the lane, and the fact that the barn itself lies towards its southern end, [redacted] suggests, indicates that the lane gave access from the road at its north-eastern end to the barn, but not to the land lying to the south-east. [redacted] also notes the presence of a number of gates across the length of the claimed byway and suggests that this 'indicates the absence of a public through-route'.

11.18 Officer Comments: Caution should be exercised in drawing any assumptions from this. Crabb's Barn lane may have the physical make-up of a lane, in that it is fenced on both sides; the reasons for this are unknown but may be a result of the inclosure processes the land was subject to. It is not uncommon for vehicular highways to be unenclosed, nor for gates to exist across them.

11.19 [redacted] has commented in detail on the evidence that has been submitted by FoDRoW in support of the application for the modification order. The points made by [redacted] are considered in analysing the documentary evidence in section 8.

11.20 Eyre v New Forest Highway Board 1892. In making the application for the modification order FoDRoW assert that the *Eyre* case is a key precedent in that a highway which entered a common and emerged the other side with no record of a highway across the common could be presumed to exist. [redacted] questions the relevance of this, in that in the Eyre case there was no doubt of public use across the common. [redacted] believes this is not a 'key precedent', nor is it a true interpretation of Eyre, to assume with confidence that 'a public carriage way must exist in the gap.' In making this point [redacted] says that whilst a way approaching a ring-fenced farm or estate might be approached at either end by ways carrying public vehicular rights, it does not follow that any such public rights must continue through the estate or farm.

11.21 Officer Comments: This is acknowledged, and in drawing conclusions from the available evidence no presumption has been made with regard to the ruling in the Eyre case.

11.22 [redacted] has referred to the Ordnance Survey Object Names Book, and notes that the Object Names Book entry for Crabbs Barn Lane records the lane as being 32 chains (0.4 miles) in length, and that it terminated at a gate.

11.23 Officer Comments: This coincides with the awarded carriage road in the Inclosure award, but it should be noted that the object names book was to record the names of physical features to be shown on Ordnance Survey maps, and had no role recording the legal status of any ways described. Referring to spot heights and bench marks shown on Ordnance Survey maps, in particular that of the 1903 25 inch OS map, [redacted] rightly points out that these have no bearing on the status of a way. Included with [redacted] appendix is a copy of a letter from the Ordnance Survey dated 6th April 2005 in which this is made clear.

11.24 [redacted] makes reference to correspondence from 1971 between the County Surveyor and the District Surveyor, in which the former asked the latter for information as to whether the County Council had maintained the route between E,F,G,H and I 'as a through road and (whether there was) any evidence that it is used by the public as a through road.' The County Surveyor further asks whether there were any obstructions on the route and explains that 'At present no public status exists but it is necessary that some public status is given to it at Review to link up bridle roads.' The response from the District Surveyor gives details of the physical make-up of the section of route referred to, and suggests that it should be recorded as a 'Byeroad(sic) open to all traffic', but fails to give any evidence as to why the route should be so recorded.

11.25 In drawing conclusions on the available documentary evidence, [redacted] states that 'Since this claim must be decided on the balance of probabilities, it must surely be the case that on balance it is more likely that the Claimed Route as a whole has never been public vehicular ...., and thus this claim must fail.'

11.26 [redacted] has made comments with regard to user evidence, which are taken into account in section 9 of this report. [redacted] has also made the same points as Mr Plumbe, that in his view the exception in the 2006 Act is not available to preserve any public vehicular rights due to the deficiencies in the evidence accompanying the applications. Officers do not agree that his is the case for the reasons set out above. [redacted] also refers to DERFA guidance on the NERC Act, which states that 'Inclusion of a route on the list of streets is not conclusive evidence of the rights it carries and there can be no presumption that any highway shown on the list of streets carries vehicular rights. Each case must be considered on its own merits.'

11.27 [redacted] stresses in this letter that 'it is extremely difficult for FoDRoW to argue that this is in effect a through route. Clearly, it was the intention that whatever public status there was in Crabbs Barn Lane should finish at the entrance to Langdon Farm'. [redacted] maintains that 'If it were already a through route, there would have been no need to set out a new public carriage road on the first stretch as far as the farm entrance.'

11.28 A further point made by [redacted] in the letter of 15 January 2010 refers to the Eyre case, and claims that this is not sufficient grounds for the 'proposition that cul de sacs ought to be joined up, that gaps ought to be bridged'. [redacted] supports this statement with reference to *Williams-Ellis V Cobb, 1935*, in which the Court of Appeal held that 'it is no longer the case (if it ever was) that a highway must end in another highway.' In referring to the relevance of this to Crabb's Barn Lane, [redacted] adds that 'it was always in essence a farm access road, accommodating the farm.'

11.29 Officer Comments: This is acknowledged, and the conclusions in this report are based on available evidence relating to the status of the route in question, and not on an assumption that a 'gap' in the recording of public rights over different sections of the way is somehow incorrect. Crabb's Barn Lane may have been a way that was used for the purposes of farming activities and to provide access to land for those purposes, but this private use would not affect the existence of any rights of the public to use it.

11.30 [redacted] for the Council for the Protection of Rural England (CPRE), has sent an email on 4 August 2018 explaining that he has 'ridden along both bridleways and no one has tried to prevent me using these Bridleways. They are good / useful Bridleways and to allow motorised vehicles to use them would spoil the condition and the safe use of these by Horses and people on their feet. Therefore, there is no need for DCC to modify their status and turn them into BOATs.' However, no further information has been supplied by the CPRE that alludes to the status of the claimed byway.

11.31 [redacted] Dorset County Council's Senior Archaeologist, has responded in an email of 1 August 2018 explaining that the route subject to the application is recorded in the Historic Environment Record as a hollow way.

11.32 [redacted] notes that the route would appear to be at least medieval in origin, but there is no detailed information about it in the Council's records. Any adjacent banks surviving as earthworks and any historic surface/metalling should be regarded as sensitive. [redacted] would be concerned that any change in status might lead to more frequent use by heavier traffic and consequent deterioration of the historic feature. [redacted] also sent an email on 4 January 2010, making these points regarding the sensitivity of the route from an archeological perspective.

11.33 These concerns are noted, but issues of archaeological concern cannot be taken into account by the Council in deciding whether to make a modification order.

11.34 [redacted] has written a letter explaining that he is opposed to 'any alterations' to the route subject to this application but does not supply any information that is of assistance in determining the status of the way.

11.35 [redacted] has sent an email on 31 August 2018 explaining that 'The previous owner of this land maintained a headland for the usage of horseriders and dogwalkers', and that 'the Eastern gate onto Whitesheet Hill has been used by walkers and riders and farm machinery for the last 23 years, but never by other vehicles'. [redacted] also points out with regard to Bridleway 35 that 'At no time during my knowledge of this track (23 years) has it ever been used other than by walkers, the occasional cyclists, horseriders and farm machinery.'

11.36 'From my knowledge of the 3 BRs over a period of 23 years I do not consider that modification of the BRs into a ... definitive byway (17 & 35) is appropriate or justifiable.'

11.37 This is helpful in considering whether use of the way has established public vehicular rights.

11.38 Mr Dupont, Director of Langdon (Dorset) Farms asks that [redacted] representations, are taken into account by the Council in making its decision as to whether to make a modification order.

11.39 [redacted] makes a further submission to the effect that, as part of the claimed route (on Beaminster Down) is on land held within a family settlement, questions arise as to capacity to dedicate. Issues about capacity to dedicate only arise in relation to an implied dedication at common law and depend on the type of any settlement.

11.40 [redacted] points out that the showing of a way as an unclassified county road in the Council's records does not in itself confirm the existence of public vehicular rights. [redacted] has emphasised this in paragraph 7 of his 2005 submission and is noted.

11.41 [redacted] has given the following information regarding the nature of the use of the claimed byway: this must be considered by the Council in assessing whether use of the way has established public rights for motor vehicles.

1. The route from Point A (on plan 18/13) to Dirty Gate is used by the public as a footpath, and local people use it to exercise horses. The road from Dirt Gate to point H is used 'by vehicles having access to Langdon Manor Farm and Langdon Manor only and the road from Dirty Gate to point F... is used by vehicles having access to Higher Langdon Farm only. Only farm and gamekeeper vehicles use parts of the entire length of the route.'

2. 'There is an iron gate which is closed at all times at point E.' The DCC fingerpost at Dirty Gate, which was knocked down recently, was clearly worded ' Langdon No through Road'. There was historically a closed road gate at point H, which was removed when Higher Langdon House was built and the road to it tarmacked. [redacted] explains that 'on the rare occasion over the past few years whenever a vehicle has been met attempting to drive along the route they have been turned back. An inspection of the ground at point E on 6th August showed no sign of the recent passage of vehicles at all.'

3. [redacted] points out that parts of Crabbs Barn Lane between points D and E are overgrown, and that there are iron gates at both ends of Bridleway 17 which are kept shut at all times. 'There is no evidence of vehicles travelling between these gates apart from Denhay Farm's tractors.'

11.42 Officer Comments: This information must be considered by the Council in assessing whether use of the way has established public rights for motor vehicles. The user evidence that has been submitted in support of the modification order is discussed above. None of the users who have completed user evidence forms have referred to being turned back whilst using the route, but the information from [redacted] indicates that other users of the way in or on motor vehicles have been. The presence of the 'No through Road' sign at Dirty Gate may have discouraged some potential users of the way, but none of those completing the evidence form have referred to any deterrent signs. The presence of the 'No Through Road' sign does not refer to the existence or otherwise of public rights over the route, nor request that it is not used by motor vehicles. The sign does not therefore negate public rights. Users refer to the presence of gates across the claimed path, and it appears that it has been possible for these to be opened by anyone using the path. The statements of those who have completed user evidence forms, do not make any reference to their use of the way being prevented or discouraged. The number of witnesses who have not been challenged, and the lack of evidence to support the objectors' assertions, are sufficient on balance to show that use of the path by the public with motor vehicles has established public vehicular rights. This is further addressed in the conclusion in section 13 below.

11.43 On 19 January 2010 [redacted] wrote referring to [redacted] submission of 2005, and requesting that the Council 'dismiss the claim and make no order'. [redacted] points out that he has lived in the area since 1942 and 'throughout that time the only vehicular use on BR 17 and BR35 has been for agriculture and gamekeeping purposes.'

11.44 [redacted], of [redacted] objects to the application. She makes similar points to [redacted] and also asks that [redacted] representations are taken into account by the Council in making its decision as to whether to make a modification order. [redacted] points out that the showing of a way as an unclassified county road in the Council's records does not in itself confirm the existence of public vehicular rights. [redacted] has given information regarding the nature of the use of the claimed byway, which is the same as that given by [redacted] and noted above.

11.45 [redacted], [redacted] opposes the application and has made representations making the same points as [redacted] and [redacted] also asks that [redacted] representations are considered by the Council, and emphasizes that the showing of a way as an unclassified county road in the Council's records does not in itself confirm the existence of public vehicular rights. [redacted] makes similar comments to those made by [redacted] and [redacted] in respect of the use of the way, and describes the attempts that have been made to discourage use by the public in motor vehicles.

11.46 [redacted] wrote on 11 January 2010 to say that the paths are 'used by pedestrians and horse riders daily', and 'the only motor vehicles to use them are farm vehicles and this only occasionally.'

11.47 [redacted] has written in a letter of 7 September 2018 to say that he does not wish to see the claimed route made available for use by motor vehicles. [redacted] has explained in a further letter of 11 September 2018 that Bridleway 17 crosses common land that was covered in gorse and heather, and that 'all the people I have spoken to who were youngsters at the time cannot recall any bridlepath or official footpath.'

11.48 [redacted] have sent a copy of a letter to Beaminster Town Council, dated 29 August 2018. [redacted] have explained that 'Historically these bridleways have been used by walkers and horse riders in the safe knowledge that no vehicles have access.' [redacted] express concerns with regard to the use of the way by motor vehicles but have not provided any information that assists in determining its status.

11.49 [redacted] of Mosterton Ramblers has written on 22 August 2018 to 'register an objection.....on the grounds of amenity, safety and potential traffic congestion.' [redacted] has described the reasons for these concerns, but has not provided any information that is of assistance in determining whether a modification order should be made.

11.50 [redacted], Chair of Beaminster Ramblers, has sent a copy of a letter of 14 August 2018 to Beaminster Town Council. [redacted] explains that parts of the claimed byway are used as part of promoted routes by Beaminster Ramblers, and that 'we do not consider their use to be compatible with off road vehicles.' There is no information that assists in determining whether a modification order should be made.

11.51 Beaminster Town Council has sent a letter dated 19 September 2018 to say that their position has not differed from that previously submitted in 2010 in that the Town Council 'would not support a change from the current status of bridleway.' The Town Council does not hold any relevant information that would be of assistance in this matter.'

11.52 The Beaminster Society have written on 10 April 2005, 23 May 2006, 24 May 2006, and 18 January 2010. The Society has expressed concerns in the event that the path was to be recorded as a BOAT. In their letter of 24 May 2006, the Society makes reference to the presence of gates and private ownership of the way did not indicate the existence of public vehicular rights, and took the view that there was insufficient proof of public vehicular rights. No documentary evidence was supplied in support of these assertions, however.

11.53 [redacted] has supplied information regarding the seeking of permission for the use of Bridleway 14 for events held by the Motor Cycle Club. This does not provide any information on the status of the route but confirms that permission has been sought and granted in the past.

11.54 In an email of 19 January 2009 [redacted] explained that 'To my knowledge the route using Crabbs Barn Lane is only used by walkers, horses and farm vehicles for access to their fields.'

11.55 [redacted] has written on 3 January 2009 expressing concerns in the event that the route was to be used by motor vehicles, but does not supply any information that assists in determining the status of the claimed byway.

12 **Analysis of other submissions**

12.1 [redacted] has responded on behalf of Dorset Highways on 1 August 2018 to say that she has no objections to the application for the modification order.

12.2 [redacted] Team Leader of Community Highways, has responded in an email on 9 August 2018 to say that he has no objections to a modification order.

12.3 [redacted] of the Green Lanes Association has sent an email on 4 August 2018 to say that he has asked members of the Association to provide evidence of historical use of the way. No further information has been supplied, however.

12.4 [redacted] Secretary of the Dorset Group of the British Horse Society, has explained in a phone call and in an email on 8 January 2010 that the BHS does not have any information that assists with determining the status of the claimed path.

12.5 Natural England wrote on 14 January 2005 to say that they have no comment to make.

12.6 Natural England wrote on 31 December 2009 to say that they have no comment to make.

12.7 The Ramblers Association wrote on 18 January 2005 with observations from the 1890, 1904 and 1901 Ordnance Survey maps, and from the nature of the network of highways and public paths in the area. Ordnance Survey maps have been considered above.

13 **Conclusion**

13.1 It is necessary for members to decide whether the way shown on the definitive map ought to be shown as a way of another description. To reach this decision members must consider whether they are satisfied that, on the basis of the evidence described in this report, the way should be recorded as a way of another description.

13.2 In summary, the showing of the way on published maps suggests that the claimed byway open to all traffic may once have been of equal status to other routes which are part of today's established highways network. These maps do not provide evidence of the status of a way, but are of some assistance in placing a route in the context of the wider highways network.

13.3 Ordnance Survey maps published between 1811 and 1958 show the path. The 1811 and 1958 maps show its whole length in the manner of a road or lane, and other Ordnance Survey maps show it partly as a lane and partly as a track. These maps do not tell us who used the way but confirm its existence in the form shown on them.

13.4 The tithe map of 1843 shows those parts of the claimed byway between A, B and C and between C-D-E, corresponding to Crabbs Barn Lane, as land that was excluded from tithe. This suggests that the land the way occupied may have been a highway. The remaining length of the route, between E, F, G, H and I, is not excluded. Between point I and Dirty Gate, the way is shown as excluded land. Between E and I there is no path or track shown on the tithe map. The evidence of the tithe map is of some substance in supporting the existence of a public highway.

13.5 The Finance Act 1910 map shows the length of claimed byway between A, B and C, over Bridleway 17, to run within hereditament 495. The Field Book for this hereditament does not record any deduction for 'Public Right of Way or User'. The length of claimed byway over the part of Crabbs Barn Lane between C and D is shown as a strip of land that was separate from the adjacent hereditaments, and this is suggestive of highway status. The south-eastern end of Crabb's Barn Lane, between D and E, is not shown to be excluded in this way, and lies within hereditament 342. The length of claimed byway between E, F, G, H and I also lies within hereditament 342, and is not shown to be excluded as a separate area of land. The Field Book records a deduction of £100 for 'Public Right of Way or User'. It is possible that this deduction was granted because of the existence of a public highway through the land subject to the survey. This is of some assistance in indicating the existence of a highway, but its limitations must be noted.

13.6 The process of the drawing-up of the definitive map gives no information to indicate that any error was made in the recording of Bridleways 35 and 17. It is possible that the provisional map of 1964 did not include those sections of the route that were shown in the parish and draft map because these were considered to be vehicular highways, and that their showing on the definitive map was therefore unnecessary. Caution needs to be exercised in drawing any conclusions from such an assumption, and it is important to note that the listing of a way in the Council's records as a highway maintainable at public expense does not confirm the extent of public rights over it.

13.7 The Beaminster Inclosure Award of 1809 describes a route which corresponds to Crabb's Barn Lane, between C and E on plan 18/13. The Award describes this way as one other 'public carriage road and highway 30 feet wide and..... being part of the public highway towards the village of Hook...' The Inclosure map is annotated with the words 'To Hook Village' at the south-eastern end of this awarded carriage road. This gives weight to the assumption that the awarded carriageway was part of a route which continued, south-eastwards, in the direction of Hook.

13.8 It is concluded that the documentary evidence as a whole is sufficient to demonstrate, on balance, that the claimed public rights subsist.

13.9 If members are not satisfied on the basis of the documentary evidence that public vehicular rights have been shown to exist, then they should consider whether those rights have been dedicated either: -

(a) Under Section 31 of the Highways Act 1980 by having been used by the public as of right and without interruption for a period of 20 or more years, ending with the date on which the public right to use the way was brought into question; or

(b) At Common law where it can be shown that the landowner at some time in the past dedicated the way to the public either expressly, the evidence of the dedication being lost, or by implication in making no objection to the use by the public of the way.

13.10 Under Section 31 of the Highways Act 1980 and under common law the public right of way must be shown to follow a defined track and not be an area over which the public have wandered at large.

13.11 It is considered that public rights were brought into question by the application to modify the definitive map and statement, which was made in December 2004.

Dorset County Council

Regulatory Committee

Minutes of the meeting held at County Hall, Colliton Park, Dorchester, DT1 1XJ on Thursday, 21 March 2019

Present:
Councillor Ray Bryan (Chairman – for the meeting)
Councillor Mary Penfold (Vice – Chairman for the meeting)
[redacted]

Members attending
Councillor Jill Haynes – Deputy Leader; Portfolio Holder for Health and Care and County Councillor for Three Valleys – minutes 18 and 23.
Councillor Andrew Parry - Portfolio Holder for Economy, Education, Learning and Skills and County Councillor for Ferndown – minute 20.
Councillor Rebecca Knox – Leader and County Councillor for Beaminster - minutes 24 and 25.

Officers Attending: Mike Garrity (County Planning, Minerals and Waste Team Leader), Vanessa Penny (Regulation Team Leader), David Northover (Senior Democratic Services Officer) and Phil Crowther (Senior Solicitor) , Carol Mckay (Definitive Map Technical Officer), Rob Jefferies (Principal Planning Officer), Charlotte Rushmere (Principal Planning Officer) and Paul Hopkins (Countryside Access Management Ltd).

Public Speakers:-
[redacted], Trustee Bournemouth Guide Camp Association – minute 20
[redacted] Girlguiding Unit Leader – minute 20.
[redacted], County Commissioner, Girlguiding Dorset – minute 20.
[redacted], local resident/landowner – minute 20.
[redacted], local resident – minute 24.
[redacted], Solicitor – minute 25
[redacted], Beaminster Society - minute 25.
[redacted], representing Denhay Farms Ltd – minute 25.
[redacted] landowner coordinator - minute 25.
[redacted], Trail Riders Federation and applicant – minutes 23, 24 and 25.

(Note: These minutes have been prepared by officers as a record of the meeting and of any decisions reached. **They are to be considered and confirmed by the Chairman of the meeting, Councillor Ray Bryan.**

Election of Chairman

13 **Resolved**
That Councillor Ray Bryan be elected Chairman for the meeting.

The opportunity was also taken to appoint a Vice-Chairman for the meeting.

Resolved
That Councillor Mary Penfold be appointed Vice-Chairman for the meeting.

The Chairman took the opportunity to express his sincere gratitude – in his own right and on behalf of the Committee - to the former Chairman, Councillor David Jones and Vice-Chairman, Councillor Margaret Phipps, of the Committee for their commitment and contribution over the years to the work of the Committee which was much valued and appreciated - in ensuring that the Committee always acted with probity and

T354, - Application for a definitive map and statement modification order to upgrade Bridleways 17 (Part), 35 and Crabb's Barn Lane, Beaminster, to a Byway Open to all Traffic.

25 The Committee considered a report by the Service Director Environment, Infrastructure and Economy on the determination of an application to modify the Definitive Map and Statement of Rights of Way to upgrade Bridleways 17 (Part), 35 and Crabb's Barn Lane, Beaminster to record them as Byways Open to All Traffic (BOAT), following a recent Supreme Court ruling. It was confirmed that the Committee was being asked to revisit a decision to refuse five applications for BOATs taken on 7 October 2010, following a Judicial Review and subsequent Supreme Court ruling.

Officers confirmed that in response to an application by the Friends of Dorset Rights of Way – subsequently adopted by the Trail Riders Fellowship - an investigation was carried out to upgrade to a byway open to all traffic Bridleways 17 (Part), 35 and Crabb's Barn Lane, Beaminster. The Committee were now being asked to consider the evidence relating to the status of the claimed route. The Committee also needed to determine whether the applications had been made in accordance with the statutory requirements in order to determine whether rights for mechanically propelled vehicles had been extinguished.

With the aid of a visual presentation, and in taking into account the provisions of the Update Sheet made available to members prior to the meeting and appended to these minutes, the basis for the application was explained and what it entailed. Photographs and plans were shown to the Committee by way of illustration. This showed the claimed route and the points between which it ran in its current condition, as a grassy field-edge path between points A-C, a stone track between points C-F, and then a tarmac route from points F-I.

The documentary and user evidence contained in the report was referred to in detail and how this was applied in the officer's reasoning for coming to the recommendation they had. The weight to be given to the user and documentary evidence was explained. The Committee's attention was drawn to what they were being asked to take into consideration in coming to their decision.

Officers confirmed that the most substantial of the documentary evidence was the Beaminster Inclosure Award of 1809, which contained a plan showing a route which corresponded to Crabb's Barn Lane, between points C and E on plan 18/13. The Award described this way as 'one other public carriage road and highway 30 feet wide'. This was considered to be evidence of a way carrying public vehicular rights over this length of the claimed byway. However, the value of the Inclosure Award in providing evidence of public status was confined to that length of the claimed route that was awarded by it, with there being no other plan contained in the Inclosure Award. That said, the remaining lengths of the claimed byway, between points A, B and C, and between E, F, G, H and I, were marked on the Award Map as 'public highway to Hooke' which is evidence that that part of the route was already considered to be public highway at the time of the Inclosure Award.

Part of the claimed route was shown on the Tithe Map as excluded from paying a tithe which is indicative of public highway status; highways often being excluded from tithes. However, the route between E and I was not excluded from tithe. The Tithe Map evidence is less strong than the Inclosure Award but supports the existence of vehicular rights.

In addition to the documentary evidence, the report contains an analysis of the user evidence that had been submitted in support of the application for the modification order. There was evidence of use by the public with vehicles, predominantly

motorcycles, contained in the user evidence forms that were submitted following the submission of the application. Taken together, these forms were considered to fulfil the requirement of 20 or more years use by the public before the application, as of right and without interruption or secrecy, prior to the date that public rights were first brought into question. The objectors stated that they had taken steps to stop use, but none of the user evidence confirmed that.

Officers therefore concluded that there had been a presumed dedication of the route under section 31 of the Highways Act 1980 and officers also concluded that the use of the route was sufficient for an implied dedication of public vehicular rights under Common Law.

Officers reported that the available evidence showed that, on balance, a BOAT subsisted or was reasonably alleged to subsist. Consequently, they were satisfied that the claimed route including of Bridleways 17 (Part), 35 and Crabb's Barn Lane, Beaminster, as shown in the report, should be recorded as a BOAT.

As to the consultation on the application, an objection had been received from the Green Lanes Protection Group, and from the landowner's solicitor, who were of the view that the application was not made in accordance with the necessary provisions of the Wildlife and Countryside Act 1981. If this was so, public vehicular rights would have been extinguished by the effect of the Natural Environment and Rural Communities Act 2006 (NERC 2006). Questions had been raised about whether the evidence submitted with the application was sufficient, particularly when in the form of extracts of documents. Officers' view was that the application had been made in accordance with the necessary requirements.

Other objections referred to actions taken to prevent or discourage use of the way by the public with motor vehicles, but there was no evidence to show from the user evidence forms that they had experienced any acts that would give the impression that they should not be using the route. Questions had also been raised with regard to the landowner's intention and capacity to dedicate the way as a vehicular highway.

In particular, officers confirmed that the documentary evidence was considered to be strong and was supported by the user evidence, which was considered to be sufficient to fulfil the requirement of 20 or more years use by the public to demonstrate a deemed dedication under Section 31 of the Highways Act 1980. On that basis, officers had come to their recommendation that the route between Point A and Point I on Drawing 18/13, should be recorded as a byway open to all traffic.

The Committee heard from those wishing to address the Committee. [redacted] considered that there was no right for use of the route by motorcyclists, with the route being signed "to Langdon" as a no through route. He said whenever a motorcyclist had been seen, they were turned away and he had two witness's statements that challenges had been made to those using the route and that, on that basis, the application should be refused. He also would have appreciated notification of when officers made their site visit to the area to have had the opportunity to have met with them.

[redacted] made a statement on behalf of [redacted], one of the trustees who owned the land crossed by A-C. He did not know of any public vehicular use. He had seen footprint and hoof prints on the claimed route but never any vehicle tracks. The Estate had a policy to challenge unauthorised use and farm managers were instructed to do so.
[redacted] considered that there was no compelling evidence to give the impression that the route was BOAT and, on that basis, there was good reason that the application should be refused. He asserted that the UCR status did not

necessarily indicate public rights and that the mixture of recorded statuses (bridleway and UCR) was more likely to indicate the route was not a public carriageway. Moreover, the provisions of the NERC Act 2006 would have extinguished any previous rights for the route to be used by mechanically propelled vehicles because the user evidence forms were submitted after the required date of the Act. He was of the view that consideration of the application should be deferred pending an application to the Supreme Court to clarify its Order in relation to the application.

[redacted] objected to the application considering it to not be valid and that given that there were multiple classifications throughout the route, which would imply that those section were in different ownerships, this would indicate that it was highly improbable that a BOAT could exist along the whole length. He also argued that using the route for that purpose would be of little benefit as acceptable alternative routes existed which could be used.

[redacted] (TRF) strongly advocated the upgrade of the route to a BOAT given the compelling documentary and user evidence available and which officers had thoroughly analysed in coming to their recommendation. For clarification, he said that the Trail Riders Fellowship had used the route between 1973 and 2006 and ceased only when the NERC Act came into force pending determination of the route's status. He confirmed that in his experience use of the route had never been challenged. He was confident that the evidence showed that the route should be recorded as a BOAT given the activities which had taken place and particularly from the historic documentary evidence which had identified such use and that the application satisfied the provisions of the NERC Act 2006.

The Committee were then provided with the opportunity to ask questions of the officer's presentation and officer's provided clarification in respect of the points raised including about use as of right, the mix of recorded statuses, the frequency of use, the effect of locked gates and the wording of signs.

Officers also confirmed that both documentary evidence and user evidence – either on an individual basis or in combination - should be taken into consideration in coming to their decision and that if either one or the other, or indeed both, provided compelling evidence in the minds of members, then this should be used as the basis for their decision.

The Committee assessed the evidence presented by officers. They considered that the documentary evidence showed that a BOAT should be recorded between C and I. However, they did not consider the documentary evidence showed the existence of vehicular rights between A-C. They did not consider that the user evidence was sufficient to demonstrate that vehicular rights had been dedicated. On being put to the vote the Committee agreed that an order should be made on that basis.

Resolved

1) That an Order be made to modify the definitive map and statement of rights of way to record the route shown C-D-E-F-G-H-I on Drawing 18/13 as a byway open to all traffic; and that the route A-B-C remain classified as a bridleway; and
2) That if the Order is unopposed, or if any objections are withdrawn, it be confirmed by the County Council without further reference to this Committee

Reason for Decisions

1) The available evidence submitted and/or discovered demonstrated that, on balance, a highway shown on the definitive map and statement - between points C-D-E-F ought to be shown as a highway of a different status; and between points F-G-H-I ought to be recorded as highway.

(b) Lack of objection to an order may be taken as acceptance that the byway open to

all traffic does in fact subsist as described and if so the order should be confirmed.

Decisions on applications for definitive map modification orders ensure that changes to the network of public rights of way comply with the legal requirements and supports the Corporate Plan 2017-19 Outcomes Framework:

People in Dorset are Healthy:

• To help and encourage people to adopt healthy lifestyles and lead active lives

• We will work hard to ensure our natural assets are well managed, accessible and promoted.

Dorset's economy is Prosperous:

• To support productivity we want to plan communities well, reducing the need to travel while 'keeping Dorset moving', enabling people and goods to move around the county safely and efficiently.

Consideration of Urgent Item

Planning Application 6/2019/0168 - Demolition Of Bovington Middle School, Cologne Road, Bovington - Matter of Urgency

26 The Committee was asked to consider a report by the Service Director Environment, Infrastructure and Economy in determining an application as a matter of urgency – under the provisions of the Constitution - which sought agreement to delegate the determination of planning application 6/2019/0168 for the demolition of Bovington Middle School, Cologne Road, Bovington to the Planning and Regulation Manager or its equivalent role in Dorset Council.

Officers confirmed that due to the urgent nature of this proposal - in order that a development to accommodate SEND pupils could be constructed as soon as practicable to meet those needs - it was necessary to consider a suitable decision-making process to ensure it could be delivered in a timely manner.

Given the need as described, the Committee agreed that the planning application should be approved as a matter of urgency on the basis of the provisions of the Service Director's report.

Resolved

That under the appropriate provisions of the County Council's Constitution, delegated authority be granted to the Planning and Regulation Manager - or its equivalent designation in the structure of Dorset Council - for the determination of planning application 6/20/0168, for the demolition of former Bovington Middle School and associated works.

Reason for decision

In order to progress matters expeditiously and expediently given the need to provided for the practicalities of the application and that the upcoming Committee cycle would not enable this matter to be resolved as necessary

Appendix 12

Commission for New Towns v. J J Gallagher [2003] 2 P & CR 3

COMMISSION FOR NEW TOWNS v JJ GALLAGHER LTD

CHANCERY DIVISION
(Neuberger J.): December 16, 2002

[2002] EWHC 2668 (Ch); [2003] 2 P. & C.R. 3

H1 *Real property—Ownership of land adjacent to lane—Lane provided the only vehicular access to land—Potential development—Conveyance of land did not indicate that lane included—Whether presumption that a conveyance of land next to a highway carried with it that part of the highway which adjoined the land was rebutted—Whether right of way over lane—Whether lane was a public highway—Application of s.62 Law of Property Act 1925*

H2 The Commission for New Towns owned the freehold of land which it had purchased from Warwickshire County Council. Adjacent to one side of the land was a lane which provided the only practicable vehicular access to the land which the Commission wished, in due course, to develop. Warwickshire County Council had itself acquired the land in 1971 from A. who owned both the land and the whole of the adjoining lane. The 1971 conveyance did not expressly include the lane and the attached plan did not identify the lane as included in the conveyance. The defendant contended that it owned the lane and that the Commission had no rights over it other than as a bridleway. The Commission contended that it owned the freehold of the lane. That contention was based on s.62 of the Law of Property Act 1925 and/or the presumption that a conveyance of land next to a highway carried with it that part of the highway which adjoined the land; alternatively, that if the defendant owned the lane, the Commission had a right of way for all purposes over it and/or that the lane was a public highway for all purposes.

H3 **Held,** in favour of the claimant, that the presumption that a conveyance of land included the adjoining highway *usque ad medium filum* had not been rebutted in the present case. If the adjoining owner happened, as in this case, to own more than half the width of the adjoining road, it would seem logical that the presumption should lead to his being deemed to convey away the whole of his interest in the adjoining road. If, however, the presumption had been rebutted, the road would not have been included in the 1971 conveyance by virtue of s.62 of the Law of Property Act 1925 and would have been in the ownership of the defendant. Had this been the position, the Commission's contention that when the land was conveyed to the Council by A., the Council was granted, by implication, a right of way for all purposes over the lane must be rejected. The Commission had established, however, that, on the balance of probabilities, the lane was a public carriageway.

Paragraph numbers in this judgment are as assigned by the court.

H4 **Cases referred to:**

(1) *Attorney General and Newton-Abbot R.D.C. v. Dyer* [1947] Ch. 67.
(2) *Berridge v Ward* 10 C.B. (N.S.) 400; 142 E.R. 507.
(3) *Dunlop v Secretary of State for the Environment and Cambridgeshire County Council* (1995) 70 P. & C.R. 307.
(4) *Gregg v Richards* [1926] Ch. 521.
(5) *Lister v Pickford* (1865) 34 Beav. 576; 55 E.R. 757.
(6) *Marquis of Salisbury v Great Northern Railway Co.* (1858) 5 C.B. (N.S.) 174; 141 E.R. 69.
(7) *Methuen-Campbell v Walters* [1979] Q.B. 525; [1979] 2 W.L.R. 113; [1979] 1 All E.R. 606; (1979) 38 P. & C.R. 693.
(8) *Micklethwait v Newlay Bridge Co.* (1886) L.R. 33 Ch. D. 133; [1886–1899] All E.R. Rep. 885.
(9) *Pardoe v Pennington* (1998) 75 P. & C.R. 264.
(10) *Pryor v Petre* [1894] 2 Ch. 11.
(11) *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] A.C. 144; 1977] 2 W.L.R. 951; [1977] 2 All E.R. 385; (1978) 35 P. & C.R. 350.
(12) *Suffolk County Council v Mason* [1979] A.C. 705; 1979] 2 W.L.R. 571; [1979] 2 All E.R. 369; (1980) 39 P. & C.R. 20.
(13) *Wheeldon v Burrows* (1879) L.R. 12 Ch. D. 31; [1874–90] All E.R. Rep. 669.
(14) *White's Charites, Re* [1898] 1 Ch. 659.
(15) *Wright v Macadam* [1949] 2 K.B. 744.

H5 **Legislation referred to:**

Countryside Act 1968, s.30; Finance (1909–10) Act 1910; Highways Act 1959, s.214; Highways Act 1980, s.32; Law of Property Act 1925, s.62; Local Government Act 1933, s.157; Studley Inclosure Act 1817.

H6 **Action** by the claimant, The Commission for New Towns, to determine whether it owned the freehold of a lane adjacent to a strip of land already in its ownership; alternatively, if the ownership of the lane was in the defendant, JJ Gallagher Ltd, whether the Commission had a right of way for all purposes over the lane or whether the lane was a public highway for all purposes. The facts are stated in the judgment.

H7 *Kim Lewison Q.C.* and *Jonathan Karas* (*DLA*) for the appellant.
John Randall Q.C. and *Conrad Rumney* (*Wood Glaister*) for the respondent.

JUDGMENT

NEUBERGER J.:

Outline

1 The Commission for New Towns ("the Commission") owns freehold land in Worcestershire and Warwickshire known as the Wynyates Triangle ("the

triangle"). As its name suggests, it is an area of land roughly triangular in shape, with its base in the north, and its (flattened) apex in the south. The triangle is bounded by the Coventry Highway to the north, the Birmingham Road to the west, and an overgrown and muddy lane known as Beoley Lane to the west. With the exception of a very small section in the northwest (which is in Worcestershire) the triangle is in Warwickshire. The Commission and its statutory successor, English Partnerships, wish, in due course, to develop the triangle for housing.

2 The defendant, JJ Gallagher Ltd, contends that it is the freehold owner of Beoley Lane, and that the Commission, as owner of the triangle, has no rights over Beoley Lane, other than as a bridleway. If that is right then, although it has little, if any, apparent significant intrinsic value, Beoley Lane would be potentially worth a lot to the defendant as ransom land. That is because it is not practicable to obtain vehicular access to (or egress from) the triangle from (or onto) the Coventry Highway or the Birmingham Road, and it is not practicable to obtain access to (or egress from) the triangle across the short southern boundary.

3 The Commission contends that Beoley Lane is not ransom land as the defendant contends, for one or more of the following three reasons:

i) It is in fact the Commission, and not the defendant, which owns the freehold of Beoley Lane,

ii) If the defendant owns the freehold of Beoley Lane:

(a) The Commission, as owner of the freehold of the triangle, has a right of way for all purposes over Beoley Lane; and/or

(b) Beoley Lane is a public highway for all purposes— *i.e.* a public carriageway.

4 Worcestershire County Council is the second claimant in these proceedings; it is only interested in the third of the three issues, in respect of which it supports the Commission's case. It should be emphasised that the defendant accepts that the public has the right to use Beoley Lane as a bridleway, but contends that there is no public right to use it as a carriageway. In other words, the third issue is not whether Beoley Lane is a highway, but whether the public have the right to drive vehicles along it.

5 The first issue turns mainly on the effect of a conveyance pursuant to which the Commission's predecessor in title, Warwickshire County Council ("the Council"), acquired the triangle in 1971. The second issue can be dealt with comparatively shortly. The third issue requires consideration of the effect of various maps, awards and other documents prepared over the period between 1722 and 1942, with the assistance of expert evidence. Before turning to the three issues, I propose to summarise the position on the ground.

The Position on the Ground

6 Until about 1973, when the Coventry Highway was constructed across Beoley Lane, about one-third of the way along its route from the south, Beoley Lane was a lane of over 9 metres or 30 feet in width and about one and a half miles long. It runs, in the main, in a north-south direction. At its northern end, it meets the southern side of a public carriageway running east-west in a village called Holt End, which

is the parish of Beoley, in Warwickshire. Towards its southern end, after it has passed the triangle to its east, Beoley Lane turns east and joins the western side of the Birmingham Road. To the immediate east of this end of Beoley Lane, on the eastern side of the Birmingham Road, is a village called Mappleborough Green, in the parish of Studley, Worcestershire. Until around 1960, the only buildings adjoining Beoley Lane were a farmhouse and associated farm buildings, being Lower House Farm, on the western side of Beoley Lane, very near its southern end.

7 Around the point that Beoley Lane turns east towards the Birmingham Road, and just to the south of Lower House Farm, Beoley Lane passes through what used to be a common ("the Common") which abuts the Birmingham Road. The Common was enclosed pursuant to the Studley Inclosure Act 1817 ("the 1817 Act") which led to an Inclosure Map and an Inclosure Award in 1824. The triangle itself formed part of a substantial estate to the east of Beoley Lane, known as the Gorcott Hall Estate, which existed under that, or a similar, name for a substantial time. It seems clear that the owners and occupiers of the Gorcott Hall Estate were not commoners so far as the common was concerned.

8 Beoley Lane has become more impassable and less used over the past six decades (and possibly over a longer period). The oral evidence establishes that, since 1940, there has been little use of that part of Beoley Lane, which is now to the south of the Coventry Highway, with the exception of the southern most 300 metres or so. I heard oral evidence from three witnesses of fact, who were cross-examined, and I have read evidence in the form of five statements from witnesses of fact who were not cross-examined. The evidence of three of these witnesses was not challenged; the other two witnesses did not attend for cross-examination. Between them, these various witnesses gave evidence from their own knowledge as to the state and use of Beoley Lane from 1930 to the present day. It seems clear that, at least up to the end of the Second World War, the southern part of Beoley Lane (*i.e.* that part which is now to the south of the Coventry Highway) was used by members of the public on foot and on horses, moderately regularly, but not intensively. There is also evidence to suggest that it was used "on a regular basis" by cyclists, at least during the 1940s and 1950s, but I am reluctant to place much weight on that evidence, because it was given only by the two witnesses whom the defendant wished to cross examine, but was unable to do so. However, there was evidence from another witness, whom the defendant chose not to cross examine, that, during the 1940s, the southern end of Beoley Lane was used by "an occasional cyclist" and by farmers "occasionally driv[ing] their tractors".

9 By the time one gets to the second half of the 1950s, the evidence of [redacted], the Farm Manager of the [redacted] Estate between 1954 and 1960, appears to me to paint an accurate picture. While he "did not have cause to pay [Beoley] Lane much attention" he described it as "always overgrown, usually waterlogged, and in many places impassable". During his six or seven years working on the Gorcott Hall Estate, he "never saw anybody using Beoley Lane".

10 It also appears that, during the 1930s, Beoley Lane was occasionally used for motor cycle rallying, although the evidence clearly established only that it was the northern section that was used for that purpose; it may be that the motorcyclists

turned off before they reached the southern section. More recently, in the early 1970s, it appears that Beoley Lane was used by recreational motor cyclists, in groups of three or four around four times a year. The then Principal Estates and Valuation Officer of Redditch, [redacted] walked the whole length of the route of Beoley Lane around 1989. He described it as "very overgrown in places" but he said that he could walk along it. He produced some photographs which show that, at least in a significant part, Beoley Lane was muddy and waterlogged.

11 It is also clear from the evidence that, over the past 60 years or so, a substantial part of the route of Beoley Lane has been under water, particularly, I suspect, in winter. For some of its length, the whole width of Beoley Lane has been under water, although that does not appear to have prevented passage, because the water has not been very deep. However, it does appear that, particularly in the north, the water was viewed as a sufficient problem for a diversion off Beoley Lane to have been used, at least before 1940. Elsewhere along its length, especially in the south, part of the width of Beoley Lane appears not merely to have been underwater, but to have been a significant stream.

12 In early December 2002, I visited the site and saw Beoley Lane in its present state. From the north, Beoley Lane starts as a wide path going south from Holt End village to the east of Beoley, although it is not easy to tell now where one village starts and the other village stops, both villages being just to the northeast of Redditch. As one progresses southwards, after about 50 metres, Beoley Lane becomes (on its eastern side) a relatively narrow and somewhat muddy bridleway, and (on its western side), a fairly full running stream. Approached from its southern end, Beoley Lane initially goes westwards off the Birmingham Road and, after about a hundred metres, it turns northwards. For the first 300 metres or so, Beoley Lane is covered with concrete and then tarmacadam. To its immediate west are Lower House Farm and other houses which have been constructed, to judge from their appearance, in the past thirty years.

13 The tarmacadam then continues northwards, but this is on a footpath to the east of Beoley Lane, which has to its west, a public road representing effectively the eastern boundary of Redditch at that point. Beoley Lane itself runs to the east of the tarmacadam footpath, i.e. between that footpath, to its west, and the western boundary of the triangle to its east. If one continues northwards along Beoley Lane, parallel to this footpath, Beoley Lane effectively stops about a third of the way along its length to Holt End, because it is cut across by the dual carriageway of the Coventry Highway. The section of Beoley Lane, north of the first 300 metres or so, up to the southern side of the Coventry Highway, is virtually impassable throughout. For much of its length, part of the width of Beoley Lane is a stream, and for virtually all of its length, all parts of Beoley Lane are very muddy. Further, the whole of this section of Beoley Lane is heavily overgrown with shrubs, weeds, and overhanging trees.

14 So far as any means of access from the triangle onto Beoley Lane is concerned, there is a five-barred gate, of a traditional construction, about three-fifths of the way from the south along the western boundary of the triangle. The position of this gate appears to be identical to a gate shown on a 1758 plan of the Gorcott Hall Estate (to which I refer in more detail below).

THE FIRST ISSUE:

The Ownership of Beoley Lane

The relevant facts

15 It is common ground that, by a conveyance of April 26, 1946 [redacted] acquired land, which expressly included the triangle, and which also included the whole of that part of Beoley Lane adjoining the triangle, although it was not expressly referred to in that conveyance. By July 1971, [redacted] still owned the freehold of the triangle, and other land to the north of the triangle. He also owned the freehold of the whole of Beoley Lane adjoining the west of the triangle.

16 By a conveyance made on July 27, 1971 ("the 1971 Conveyance"), [redacted] conveyed the triangle to the Council. In the preamble to the 1971 conveyance, reference was made to the fact that the Council had made a compulsory purchase order in 1969 ("the CPO") to enable it to acquire land on the east of the triangle. That land is coloured red on the plan annexed to the 1971 conveyance, and it amounted to about 15 per cent of the triangle. The preamble also stated that the CPO was made for the purpose of constructing a road, which has now been constructed, and is the realignment of the Birmingham Road consequential on the then-proposed construction of the new Coventry I-Highway.

17 The preamble went on to mention that, additionally, [redacted] had agreed to sell, and the Council to buy, the remainder of the triangle, coloured blue on the plan. This accounted for the balance of 85 per cent of the triangle. The preamble further stated that the land coloured blue was being acquired by the Council pursuant to its powers under s.214 of the Highways Act 1959 and s.157 of the Local Government Act 1933. It further referred to the fact that the land to be conveyed had been valued by the District Valuer at £24,700 (the sale price in the 1971 conveyance), which included a claim for injurious affection.

18 It is clear from the contemporary correspondence and other documentation that the CPO had the purpose described in the 1971 conveyance, namely to construct a realigned Birmingham Road as a result of the projected construction of the Coventry Highway. It is also apparent that [redacted] wanted the Council to acquire the whole of the triangle. It is similarly clear that this was commercially acceptable to the Council, not least because the northern part of the triangle was needed by Redditch New Town Development Corporation ("Redditch") for the construction of the Coventry Highway itself. It was also attractive to Redditch and the Council because an underpass would otherwise have had to be constructed under the projected Coventry Highway, to enable [redacted] to obtain access to the land coloured blue from the land retained by [redacted] to the north. It further appears clear from the negotiations that [redacted] knew that the new Coventry Highway would be constructed across the northern part of the triangle and across Beoley Lane.

19 On October 15, 1970, the District Valuer carried out an initial valuation of the land to be conveyed, at £18,300. In that valuation, he identified the land to be conveyed, by reference to plot numbers shown on the 1905 Ordnance Survey ("O.S.") sheets, which did not include the plot number for Beoley Lane. In the

valuation, he identified precisely the same acreage of land as that identified in the conveyance. He also distinguished between the blue land "acquired for Redditch … for [the Coventry Highway]" and the red land "acquired for [the] Council for [Birmingham Road] improvements". [redacted] negotiated on [redacted] behalf with the District Valuer, and it appears that [redacted] and the District Valuer eventually agreed the £24,700 valuation.

20 The plan attached to the 1971 conveyance ("the plan") is not conspicuously clear, although the extent of the areas coloured blue and red are quite apparent. The location of the proposed realignment of the Birmingham Road was shown by a series of pecked lines going roughly north/south in the land coloured red within the triangle. Also shown on the plan was a proposed substantial intersection between the realigned proposed Birmingham Road and the Coventry Highway; this intersection, which included a gyratory system, was partly to the east of the triangle, and partly on the land coloured red and partly on the land coloured blue, within the triangle. The proposed route of the Coventry Highway was also shown on the plan marked with a pecked line going west from this intersection along the north part of the triangle and along the northern section of that part of Beoley Lane, which ran along the western boundary of the land coloured blue.

21 The land conveyed by [redacted] to the Council was described in the 1971 conveyance as:

> "ALL THOSE several pieces or parcels of land containing in the whole [45.197] acres or thereabouts situated at Gorcott Hill in the Parish of Studley in the County of Warwick and being enclosures Nos. 19, 23, 36 and 37 and parts of enclosures Nos. 8, 9, 20, 21, 22, 24, and 27 on Sheets Nos. XXXI-2, 5 and 6 of the Second Edition of 1905 of the O.S. Map for Warwickshire and which said pieces or parcels of land are for the purpose of identification only delineated on the plan annexed hereto and coloured as to part red [and] as to further part blue …"

22 It is clear that a very small part of enclosure No. 15 was accidentally omitted from that description, but it was included, both in the District Valuer's Valuation, and on the plan. The colouring on the plan appears to have obliterated much of the marking underneath. However, it seems clear from the numbering of various areas shown on the plan, but not coloured red or blue, that the numbering referred to in cl.1 of the 1971 conveyance was reflected in the numbering on the plan. In particular, Beoley Lane, which is not included in the coloured land, is marked 35. The 1905 O.S. Map similarly shows Beoley Lane marked 35.

23 Thereafter, the Council constructed the realigned Birmingham Road on the red land, *i.e.* on the west of the triangle, and it appears to have conveyed the remainder of the triangle to Redditch. During the first half of the 1970s, Redditch constructed the Coventry Highway along the north of the triangle. As projected, it cuts across Beoley Lane, which is now a cul-de-sac. Redditch's statutory successor is the Commission, which now intends to redevelop the remainder of the triangle for housing purposes. Vehicular access to the triangle cannot be obtained (or, possibly could only be obtained with difficulty and expense) from the Birmingham Road or

the Coventry Highway. For that reason, vehicular access from Beoley Lane is of considerable potential value.

24 In these circumstances, the defendant's case, at least at first sight, is simple. It is clear that the land conveyed by the 1971 conveyance, when one looks at the description in the 1971 conveyance, which does not include enclosure 35, and at the plan, on which Beoley Lane is not coloured, did not include Beoley Lane. However, Mr Kim Lewison Q.C, who appears with Mr Jonathan Karas, for the Commission, contends that Beoley Lane was nonetheless included in the 1971 conveyance. This contention is based on the provisions of s.62 of the Law of Property Act 1925 (" s.62") and/or the presumption that a conveyance of land next to a highway carries with it that part of the highway which adjoins the land, and is owned by the vendor. I propose first to consider the second argument, which is based on what I will call the "highway presumption", and then I will turn to s.62.

The highway presumption

25 The highway presumption has been defined in the following terms:

> "Where a piece of land which adjoins a highway is conveyed by general words, the presumption of law is, that the soil of the highway usque ad medium filum passes by the conveyance, even though reference is made to a plan annexed, the measurement and colouring of which would exclude it."

This quote is taken from the headnote in *Berridge v Ward* 10 C.B. (NS) 400, cited with approval by Waite L.J. in *Pardoe v Pennington* (1996) 75 P. & C.R. 264 at 269.

26 There are two issues to be considered. The first is the effect of [redacted] owning the whole of the width of Beoley Lane adjoining the west of the triangle. The second is whether the presumption is rebutted in the present case.

27 As I have mentioned, it is common ground that Beoley Lane is a highway (although the extent of the permitted public use is in dispute). Normally, when a highway (or part of a highway) divides properties in different ownership, the owner of the property each side can be shown, or is deemed, to have included in his ownership, the soil of the highway adjoining his property up to the middle of the road. Hence the reference in the headnote in *Berridge* to "usque ad medium filum". However, a somewhat novel point arises in the present case, because, although [redacted] owned the triangle to the west of Beoley Lane and did not own the land on the other side of that part of Beoley Lane, he owned the whole of that part of Beoley Lane adjoining the triangle. In those circumstances, it is the Commission's case that, unless the presumption is rebutted in the present case, the whole of that part of Beoley Lane adjoining the triangle must have been included in the 1971 conveyance by virtue of the highway presumption. Despite argument to the contrary by Mr John Randall Q.C., who appears for the defendant with [redacted] I consider that that submission is well founded in principle and on authority.

28 So far as principle is concerned, the highway presumption is that, in the absence of a good reason to the contrary, where a vendor conveys land adjoining the

highway and (as is usual) he therefore owns the land of the adjoining highway ad medium filum, he should be presumed to have conveyed away that land, which he owns under the highway, together with the land the subject of the express conveyance. The rule is essentially one of convenience, both in public terms and bearing in mind the interests of the parties. It is undesirable, in terms of public interest, to have odd pieces of land, whose ownership is largely academic in practice (unless, for instance, the highway is diverted), vested in persons who have no interest in any adjoining land, and who may well not even be aware that they own part of the highway. It is in the interest of the parties to a conveyance that the purchaser takes the adjoining highway land, essentially for the same reason. On that basis, if the adjoining owner happens to own more than half the width of the adjoining road, even all the adjoining road, it would seem logical that the presumption should lead to his being deemed to convey away the whole of his interest in the adjoining road. To put the point more simply, if the rule is that, in the absence of good reason, a person should not retain the half of a highway adjoining land which he sells, it seems almost a fortiori that he should not retain the other half of the adjoining highway, if he happens to own that half as well. Further, there is no inherent reason why the soil of the whole of the highway should not be deemed to be conveyed away: consider a case where the vendor owns, and is conveying land on each side of the highway.

29 Although there is no case in which this issue has been considered in circumstances where the vendor owns the whole of the adjoining road, it seems to me that significant support for my conclusion can be found in an observation of Romer J in *In re White's Charities, Charity Commissioners v Mayor of London* [1898] 1 Ch. 659 at 666:

> "In the ordinary case where it is said that the presumption is that the soil of the highway ad medium filum is intended to pass, that is because, as between owners of land abutting the highway between them, the presumption is, in the absence of knowledge of the precise facts, that each owner does own the soil of the highway ad medium filum. If it turned out that the presumption was not accurate in fact, and that, as between the owners of the properties on the opposite sides of the highway, the highway was unequally divided between the two, then the sole effect of that would be, not that it would negative the presumption that the soil of the highway passed by a conveyance by the owner of the property on one side of the highway, but the presumption would then be that the conveyance passed the soil of the highway so far as it was vested in the conveying party."

30 Accordingly, I turn to consider the second question relating to the highway presumption, namely whether, on the facts of this case, that presumption is rebutted. Before turning to consider that question by reference to the facts of this case, it is helpful to mention the authorities on the subject to which I have been referred.

31 In *Marquis of Salisbury v Great Northern Railway Company* (1858) 5 C.B. (NS) 174, the conveyance listed those parcels of land which were included in the conveyance, including two parcels, with their respective numbers as shown on a

plan, which were either side of the road, which itself had a number on the plan, and which was not identified as included in the conveyance (see at p.176). Further, both vendor and purchaser believed that the vendor did not have title to the road. The court concluded that the road was not included in the conveyance, *i.e.* that the highway presumption was rebutted.

32 Williams J., at p.210, thought that the point was clear, and based his reasoning on the understanding of the parties and the terms of the conveyance. Crowder J., at pp.214 to 215, "entertained some doubt" on the point, and, while it seems plain that he relied on the terms of the conveyance, it is not entirely apparent, at least to me, how much weight he placed on the understanding of the parties: at the very least, he thought it was worth mentioning. Byles J., at p.217, agreed with both judgments.

33 In *Berridge*, it was held that the road was included, *i.e.* the highway presumption was not rebutted. In that case, the name of each piece of land to be conveyed, together with its respective area, was set out in the conveyance, and the land to be conveyed was shown coloured on a plan, which also contained the numbers. Again, there was no reference to the road in the conveyance and the road was not included in the coloured area on the plan. Two grounds for distinguishing *Salisbury* appear to be that the plan did not disclose a specific enclosure number for the road in question, and that the parcels clause conveyed the land "together with all roadways belonging or appertaining" (see at p.402). I am not impressed with the latter ground, as it was not referred to in the judgments and, a similar provision was expressly not relied on in *Micklethwait v Newlay Bridge Company* (1886) 33 Ch. D. 133 at p.145 (see below).

34 In *Berridge* at p.415, Erle L.J. effectively contented himself with identifying the highway presumption and saying that it was not rebutted Williams J., who had been party to the decision the other way in *Salisbury*, said this at p.416:

> "In the case of … *Salisbury* …, there was enough on the face of the conveyance which was set out in the special case to shew that moiety of the adjoining highway was not intended to pass. That case, therefore, is out of the general rule. There is nothing in the present case to take it out of that general rule."

Willes and Keating JJ. agreed in the result.

35 In *Micklethwait* itself, the Court of Appeal held that the highway presumption applied equally to a water way as it did to a road. At p.145, Cotton L.J. held that the presumption was not rebutted in a case where the land conveyed was "described by quantity of yards and … as being bounded to the north by the river". Thirty years after the conveyance, it was proposed to build a bridge over the river, a proposal which meant that ownership of each half of the river became potentially valuable. While Cotton L.J. accepted that "the surrounding circumstances" could be relied on to rebut the presumption, he emphasised that one could not take into account circumstances which were not and could not have been in the minds of the parties at the time of the conveyance, and only arose afterwards. He also made it clear that he rested his decision on the highway presumption rather than the fact that the conveyance included all "water courses" appertaining to the land conveyed.

36 In *Pryor v Petre* [1894] 2 Ch. 11, the highway presumption was held to be

rebutted by Romer J., whose decision was upheld by the Court of Appeal. The conveyance described the land conveyed as "comprising 52.645 acres" and as shown delineated on a plan. The conveyance contained a schedule which described the property to be conveyed by reference to numbers appearing on the O.S. plan. The road in question was shown on the plan with a plot number, but it was not shown on the plan as included in the sale, nor was it referred to in the schedule. There was also evidence that the timber on the land conveyed had been valued, and that the valuation did not extend to trees on the road.

37 At 18, Lindley L.J. described the case as being "very near the line". At p.19 he said:

> "When you find the parcels described with reference to the ordnance map, the numbers on that map appear to me to be too important to be left out of account."

At pp.19 to 20, he concluded that the evidence of the timber valuation, and the fact that it did not extend to the trees on the road, was admissible, not least because reference was made to the valuation in the recital to the conveyance.

38 At p.20, having referred to the contents of the conveyance, including the precise acreage, and the designation on the plan, including the apparent exclusion of the road, Lindley L.J. said this:

> "That, of course, after the decision in *Berridge v Ward*, is not conclusive by any means; neither is the acreage coupled with it sufficient to rebut the general presumption. But when we come to look at the recital with respect to the trees, it appears to me that the learned Judge has decided this case rightly upon that recital and upon the fact that the trees which were valued were trees on the property defined in the parcels, but excluding the [road] in question"

He concluded:

> "One of the several facts which I have mentioned would not be conclusive; but when we join them altogether it is difficult to say that this piece of land passed by the presumption of law, and that there is not sufficient to rebut the presumption."

39 At p.21, Kay L.J. said this:

> "First of all, on the face of the deed, the acreage does not include any part of this road; secondly, it is described by reference to the ordnance map, and the numbers on the ordnance map are copied on the map which is part of this conveyance. This moiety of the road is included in a piece numbered 5, and No. 5 is not referred to in the deed. That is another point. Then you find upon that map on the deed that the freehold land, which includes this wood, is edged with a pink line, and this pink line is so drawn as not to include one moiety of the road."

40 He went on to say this:

> "However, I agree that those facts alone, after the decision in *Berridge v Ward*, although they are very strong and significant, might not be enough to rebut the presumption; but then we have another fact [sc. a valuation of the timber excluding the trees on the road] which, added to those facts, to my mind does turn the scale. The presumption is, I think, rebutted by an accumulation of facts, a few of which alone, or it maybe any of which alone, might not be enough to rebut it; but when you get the force of the whole accumulation, that . . . seems to me . . . sufficient to rebut the presumption."

The judgment of AL Smith L.J. was to much the same effect (see at pp.24 and 25).

41 Finally, I should refer to *Pardoe*. In that case, the Court of Appeal held that the highway presumption was rebutted, for reasons which were set out at pp.270 to 271. I do not propose to go into those reasons, because they are special to the facts of the case. However, it seems to me that none of them were based on the terms of the conveyance itself; rather, they arose from practical and common sense factors which would have been known to both parties to the conveyance at the time of its execution.

42 Confining oneself to the description of the property conveyed by, and the contents of the plan appended to, the 1971 conveyance, it appears to me that, at least on the basis of the authorities, each party has a fairly powerful case. As [redacted] points out on behalf of the defendant, the facts of the present case are virtually indistinguishable from those in *Salisbury*, where the presumption was rebutted. First, the land to be conveyed is shown coloured on a plan attached to the conveyance, and it is clear that the colouring has been done carefully, and does not extend to the highway in question. Secondly, the parcels to be conveyed are identified in terms in the conveyance by reference to their numbering on a plan, and the highway has a specific number on the plan, and that number is not included in the conveyance. Indeed, it may be said that the present facts are slightly stronger against the presumption, than those in *Salisbury*, because the presumption in *Salisbury* applied to only half the road, whereas here it applies to the whole road: it is perhaps a little more significant that the colouring does not extend to the whole road, than it would be if the colouring should only have extended to half the road.

43 However, there was clear and positive evidence in *Salisbury* that the parties believed that title to the road in question was vested in a third party, not the vendor. That fact, certainly appears to have been treated by Williams J., and, I think, Crowder J., as providing support for the contention that the parties could not have intended that the road be included in a conveyance from the vendor. In the present case, there is no suggestion of such a belief on the part of the parties to the 1971 conveyance. *Salisbury* is therefore of some, but limited, help to the defendant, at least if one limits oneself to the terms of the 1971 conveyance.

44 On the other hand, still confining myself to the specific identification of the land to be conveyed in the conveyance and the plan, the distinction between the present case and *Berridge* is pretty slight. The only difference which appears to me to carry any weight is that the conveyance plan in the present case shows the road with a number, whereas the road had no number in *Berridge*. It does not seem to me that the decision in *Pryor* takes matters much further in this connection, given the

somewhat equivocal observations as to the correct answer if there had been no timber valuation. However, Lindley L.J.'s indication that that case was "very near the line", even with the timber valuation evidence, is somewhat helpful to the Commission's case.

45 If the issue had to be determined on the narrow basis so far considered, I would have found it difficult to resolve. However, each party relies on other points to support their respective positions with regard to the highway presumption. Those arguments depend on commercial common sense, and accordingly they may be seen by some to be rather more forceful in the modern context than nice points of drafting (particularly in light of the approach of the Court of Appeal in the most recent case on the highway presumption, namely, *Pardoe*. While these points may be more attractive, their combined effect does not make the determination of the issue any easier.

46 Four further factors are relied on by the defendant to rebut the highway presumption, namely, the District Valuer's valuation, the possibility of the vendor wanting to use Beoley Lane for the benefit of his retained land, his desire to keep Beoley Lane as a ransom strip and the poor drafting of the 1971 conveyance. Two factors are advanced by the Commission to support the application of the presumption, namely the parties' appreciation of Redditch's requirement for part of Beoley Lane, and the likelihood that the vendor thought he did not own or need Beoley Lane. I shall take these points in turn.

47 The defendant's first contention, namely that the District Valuer's valuation clearly excluded any part of Beoley Lane, appears, at any rate at first sight, a strong point for rebutting the highway presumption, in light of the decision and reasoning in *Pryor*. In each case, there was a valuation, which was referred to in the preamble to the conveyance, and which can be shown to have excluded the highway concerned. However, unlike in *Pryor* there is no evidence in the present case that, at the time of the conveyance, the highway had any value In *Pryor* it was agreed that the trees on the road had a specific value, which was plainly not included in the timber valuation referred to in the conveyance. Here, there is reason to believe that Beoley Lane was of no practical utility (being overgrown over most of its route, and waterlogged in many places), indeed, there is no evidence that it had any value. [redacted] suggests that that part of Beoley Lane adjoining the triangle must have had some value, given that it was over one acre, about half a hectare in area. I am not persuaded by that. It is one thing to say that an unencumbered one acre of field of regular shape must have a value; it is quite another to say that an overgrown, waterlogged, etiolated strip of land, subject to public highway rights throughout, must have a value. In this case, therefore, I think that the valuation evidence takes matters only a little further than the terms of the conveyance itself.

48 The defendant's next argument, that [redacted] the vendor under the 1971 conveyance, might well have had an interest in retaining the relevant part of Beoley Lane as a means of access, has apparent attraction if one considers the position on a plan as at 1971. [redacted] retained land which was to the north of the triangle which abutted Beoley Lane. He might well, therefore, at least on the face of it, have wanted to retain that part of Beoley Lane adjoining the triangle, in order to obtain access from the south to his retained land. There are, however, two

serious objections to that argument. First, there is nothing to suggest that, in 1971, Beoley Lane was used as a means of access (whether from the south or at all) to any land owned by [redacted] (whether the triangle or the retained land). Indeed, there was oral evidence which fairly strongly indicates that Beoley Lane was hardly used at all by 1971; further, such evidence as there is as to its use at that time does not suggest that there was any use for access to, or egress from, any land abutting Beoley Lane. Secondly, [redacted] cannot have been interested in using Beoley Lane as a means of access to his retained land from the south. The Coventry Highway, which he knew, as at the date of the 1971 conveyance, was to be constructed in the near future, would cut across the northern sector of that part of Beoley Lane adjoining the triangle. It would have been clear that this would cut off any vehicular access to [redacted] retained land, from the south along Beoley Lane. Indeed, it seems from the evidence that, by the date of the 1971 conveyance, preparatory work in connection with the relevant part of the Coventry Highway had already started. Correspondence suggests that Redditch had already entered onto the triangle, and started such preparatory work by the end of April 1971, some three months before the 1971 conveyance.

49 I turn to the contention that [redacted] could have wanted to retain Beoley Lane for the very purpose that it is now being used by the defendant, namely with a view to sharing in any development value of the triangle. I do not consider that that is a good point It seems to me to run into the same difficulties as the argument that was rejected in *Micklethwait* Just as it could be said in that case that it was foreseeable that someone in the future might want to construct a bridge across the river, so it might be said in this case that it would have been foreseeable in 1971 that the triangle might be developed at some point. The essential point is that the prospect in question was not in the minds of the parties at the date of the conveyance: it only came into contemplation some 30 years later (both in *Micklethwait* and in the present case).

50 I am also unimpressed with the defendant's fourth contention, namely that the 1971 conveyance was poorly drafted. It is true that there was an accidental omission of a small part of plot 15 from the list of properties in the parcels clause in the conveyance (although the small part is clearly included in the plan, if one compares it with the 1905 O.S. plan, of which it is a coloured-up copy). Further, if anything, it could be said that this oversight means that the failure to mention Beoley Lane by plot number in the 1971 conveyance is of less, rather than more, significance, but, in my view, the point is irrelevant. The second defect alleged to exist in the 1971 conveyance is the omission of a small piece of land on the northwest of the triangle. That omission is convincingly explained by [redacted] the piece of land in question was omitted because it was in Worcestershire (unlike the rest of the triangle which was in Warwickshire) and the Council could therefore not acquire it.

51 The Commission's main point is that it is clear from the position on the ground, the pecked lines on the plan attached to the 1971 conveyance, and the documentation leading up to the execution of the conveyance, that all the parties knew that one of the two purposes of the Council (effectively on behalf of Redditch) in acquiring the triangle was to enable Coventry Highway to be

constructed across its northern part, and across the northern section of that part of Beoley Lane adjoining the triangle. Accordingly, if the highway presumption does not apply, and [redacted] retained that part of Beoley Lane, he would have been able to hold up the construction of the Coventry Highway, or a very narrow section of that highway, unless and until a section of Beoley Lane had been compulsorily or voluntarily acquired from him by the Council on behalf of Redditch, or by Redditch directly. Particularly as Redditch owned the land immediately to the west of that section of Beoley Lane, and [redacted] owned no other land which was required for the construction of the Coventry Highway, it seems to me that this represents a significant point in favour of, or bolstering, the application of the highway presumption.

52 The Commission's second point is effectively a composite contention. It is that Beoley Lane had no apparent value, that [redacted] whether as owner of the retained land to the north, or in any other capacity, did not appear to have used, or have benefited from, Beoley Lane, and, indeed, that the parties to the 1971 conveyance will not have appreciated that [redacted] owned that part of Beoley Lane. These points appear to me to be correct. On their own, however, they do not take the issue of the highway presumption much further either way. Nonetheless, in my view, they tend rather to reinforce the application of the highway presumption, in that they emphasise that there is no apparent extraneous reason, which outweighs the Commission's first argument to support the application of the highway presumption in the present case. In particular, it should perhaps be emphasised that this is not a case, like *Salisbury*, where the parties positively believed that the roadway was owned by a third party, it is a case like *Micklethwait*, where the parties "probably never thought about the point"—see *per* Cotton L.J. at 33 Ch D 147, and *per* Lindley L.J. to much the same effect at 153.

53 Like Lindley L.J. in *Pryor*, this case appears to me to be "very near the line". Nonetheless, the Commission's arguments persuade me that, in light of the approach of the courts in the various authorities cited above, the defendant's arguments, even when taken together, are insufficient to rebut the highway presumption applying in the present case. Although the facts of the present case, as to the identification of the property to be conveyed in the conveyance and plan, are very similar to those in *Salisbury*, and although there is a close apparent similarity with *Pryor*, so far as the valuation aspect is concerned, I am not persuaded the presumption is rebutted. In *Salisbury*, there was the additional fact that the parties clearly believed that the road was owned by a third party. (In this connection, although Williams J. seems to have suggested in *Berridge* that *Salisbury* was decided simply by reference to the terms of the conveyance alone, I am not convinced that that observation is correct) In any event, the decision in *Berridge* itself, and the observations of the Court of Appeal as to the effect of the description of the property in the conveyance in *Pryor*, render the descnption of the property in the 1971 conveyance (and plan), a somewhat uncertain basis for holding that the highway presumption has been rebutted in the present case. In any event, there are the extraneous factors in the present case which did not exist in *Salisbury*. As to *Pryor*, although there was a valuation in the present case which excluded the road, there is no evidence as to the value, if any, of the road, and there is a real possibility

that it had no value. Furthermore, in *Pryor* there was no other extrinsic evidence as there is in the present case.

54 In the end, of course, I am concerned with construing a particular document, the 1971 conveyance, in the context of its own factual matrix. To ignore earlier cases would be wrong. They contain valuable guidance as to the approach to be adopted to the highway presumption. Further, it could lead to inconsistency, and therefore to undesirable uncertainty, if I did not consider those earlier cases in the context of the present issue. However, it is notoriously dangerous to construe a document by comparing its terms with the terms of different documents entered into in different circumstances.

55 In the end, it seems to me that the essential factors in the present case, so far as the application of the highway presumption is concerned, are as follows:

i) Beoley Lane is a highway, part of which adjoins the triangle which was conveyed by [redacted] to the Council;

ii) The soil of the whole of that part of Beoley Lane which adjoined the triangle was owned by [redacted]

iii) The highway presumption therefore applies to the whole of that part of Beoley Lane which adjoins the triangle;

iv) It is for the defendant, standing effectively in the vendor's shoes, to establish that the highway presumption is rebutted;

v) The effect of the cases, and of normal principles of construing contracts, is that the presumption will be rebutted if it is sufficiently clear, from the terms of the conveyance and/or from the surrounding circumstances, that the vendor was intending, and/or the vendor had good reason at the time, to retain the soil of the adjoining highway;

vi) One must therefore look at the terms of the conveyance and the surrounding circumstances and ask oneself whether, taken as a whole, they rebut the highway presumption;

vii) The fact that Beoley Lane was not mentioned or included in the 1971 conveyance, or marked on the plan as included within the land to be conveyed, is plainly not enough to rebut the presumption: otherwise the presumption would be virtually always redundant;

viii) The fact that Beoley Lane had a plot number and the 1971 conveyance identified the properties to be conveyed by reference to plot numbers which did not include Beoley Lane, is a factor which should be taken into account and militates against the presumption;

ix) The fact that the property to be conveyed was the subject of a valuation (referred to in the 1971 conveyance) which clearly did not extend to any part of Beoley Lane, provides some basis for rebutting the presumption, but it is of limited value given that there is no evidence that any part of Beoley Lane had any value, and there is real reason for thinking that it had no value;

x) In view of the imminent construction of the Coventry Highway (obliquely referred to in the 1971 conveyance by virtue of the mention of s.214 of the Highways Act 1959, and identified more plainly by pecked lines on the plan attached to the conveyance), the evidence as to the virtual absence of

any local use of Beoley Lane, and the complete absence of any evidence as to the use of Beoley Lane for access to [redacted] retained land, there is no real force in the point that [redacted] might have wanted to retain that part of Beoley Lane adjoining the triangle, in order to obtain access to his retained land;

xi) The notion that the vendor might have wanted to retain that part of Beoley Lane in order to be able to participate in any eventual development value of the triangle is irrelevant, as it was not in the minds of the parties at the time;

xii) The requirement of Redditch (via the Council as purchaser under the 1971 conveyance) to obtain a significant section of the relevant part of Beoley Lane for the construction of the Coventry Highway (evident from the plan attached to the 1971 conveyance) is a substantial factor in favour of the highway presumption applying, especially as [redacted] retained no other land needed for the construction of the highway, and Redditch already owned the land needed for that purpose, on the other side of Beoley Lane.

56 Bearing in mind the potential importance of surrounding circumstances (as emphasised in *Micklethwait* and in *Pardoe*), especially when they can be identified by reference to the terms of the conveyance and the plan attached thereto, I am of the view that the highway presumption is not rebutted in the present case The fact that Beoley Lane had a number on the plan which is not mentioned in the conveyance, and the fact that Beoley Lane was not included in the valuation, as well as the very weak point that the vendor may have wanted to keep the relevant part of Beoley Lane for access to his retained land, are at the very least balanced, and in my view are outweighed, by the facts that it was clear that a section of the relevant part of Beoley Lane was needed by Redditch (via the Council) for the construction of the Coventry Highway, and Beoley Lane had no real apparent value to [redacted]

57 Given this conclusion, it is strictly unnecessary for me to considered the alternative basis upon which the Commission contends that the relevant part of Beoley Lane was conveyed away in the 1971 conveyance, namely pursuant to s.62, or indeed the other two main arguments. However, because they have been fully argued, and because this case may go further and the remaining points (especially the third issue) involve making findings of fact, I shall deal with those remaining arguments.

Section 62

58 I turn to the Commission's contention that, if the relevant part of Beoley Lane was not conveyed to the Council in 1971 by virtue of the highway presumption, it was so conveyed by virtue of s.62 of the Law of Property Act 1925. The provisions of ss.62(1) and (4) are as follows:

> "(1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land or any part thereof, or, at the time of

> conveyance, demised, occupied, or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof.
>
> . . .
>
> (4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained"

59 If that part of Beoley Lane adjoining the triangle is a "way . . . enjoyed with . . . or appurtenant to [the triangle]", then I think it would follow, from my reasoning as to why the highway presumption is not rebutted, that s.62(4) is not engaged, and that therefore the Commission's alternative argument based on s.62 would succeed. In this connection, [redacted] accepts, in my view rightly, that the s.62 presumption is at least as strong as the highway presumption. In my judgment, it is stronger, and therefore harder to rebut. My view is not so much based on the fact that s.62 involves a statutory presumption, it is based more on the way in which s.62(4) is worded. The authorities already discussed indicate that the highway presumption can be rebutted by implication. It seems to me, however, that s.62(4) requires an express rebuttal of the s.62 presumption, although there is no reason to think that the express words need refer to s.62. After all, s.62(4) refers to "a contrary intention" being "expressed" in the relevant conveyance.

60 This view appears to be supported by authority. In a case concerned with the statutory predecessor of s.62, namely s.6 of the Conveyancing Act 1881, *Gregg v. Richards* [1926] Ch. 521, Pollock M.R. said this at pp.526 to 527 and 529:

> "It is not suggested in any of the cases that that must be an expression in absolute terms, but it is worth noting that the word used in the sub-section is 'expressed' and not, as in some other cases . . . 'unless the contrary intention appears'".
>
> "Under those circumstances I do not think the . . . canon of construction, 'expressio unius exclusio alterius,' is appropriate here."

The observations of Sargant L.J. at pp.534 and 535 are to much the same effect.

61 The question, therefore, is whether Beoley Lane was "appurtenant to" or "enjoyed with" the triangle, within the terms of s.62(1). The large category of items included in s.62(1) is a mixture of physical things and incorporeal hereditaments, and a mixture of the obvious (*e.g.* "buildings" or "fixtures") and items which lead to somewhat unexpected results (thus s.62 can effectively convert a precarious licence into an easement: see *Wright v Macadam* [1949] 2 K.B. 744). Further, it appears to me clear that it was not intended that all the verbs at the end of s.62(1) could apply to all the items listed therein. Thus "occupied" cannot govern "easements". There is therefore no inherent reason why, for instance, "enjoyed with" should govern "buildings" or other physical items.

62 The essential questions in the present case for the purpose of determining the s.62 issue, are (a) whether a way not otherwise included in the conveyance can be said to be "appurtenant to" or "enjoyed with" the conveyed land under s.62, and, if so, (b) whether, on the facts of this case, that part of Beoley Lane adjoining the triangle was "appurtenant to" or "enjoyed with" the triangle.

63 The first question is potentially wide-ranging: is s.62 apt to include other physical land, not referred to in the conveyance, with the land expressly to be conveyed? In my view, while, in very exceptional circumstances, it might be possible (a point which I leave open), it would not be a permissible result in a normal case. For instance, if a vendor sells a house to an occupying purchaser, who is currently permitted by the vendor to store materials (to the exclusion of others) in a nearby garage owned by the vendor, it cannot possibly be right that the garage, not otherwise included, but not referred to, in the conveyance, is deemed by s.62 to be so included because it is "enjoyed with" the house. (I accept, that the effect of s.62 might well be to convert the licence to use the garage into an easement, in light of the decision in *Wright*).

64 In my view, "enjoyed with" refers to incorporeal hereditaments, such as easements, and not to physical property. So, too, with the word, "appurtenant". Authority suggests that, at least so far as its normal meaning is concerned, land cannot be "appurtenant" to other land: see the authoritative observation of Sir John Romilly MR in *Lister v Pickford* (1865) 34 Beav. 576 at 580, and the discussion in *Methuen-Campbell v Walters* [1979] Q.B. 525, 534–535 *per* Goff L.J., and at 542–543 *per* Buckley L.J.

65 Section 62 is "designed to make it unnecessary to set out the full effect of every conveyance by 'general words' extending it to all kinds of particulars"—see Megarry & Wade, "The Law of Real Property", sixth edition, at para.18–108. In those circumstances, I do not think that the court should be anxious to give "appurtenant to" or "enjoyed with" a very wide meaning, particularly if it is inconsistent with their normally accepted legal meaning, albeit that I accept that any such expression must be interpreted according to its context. Although the statutory insertion of words in order to shorten deeds may sometimes have a fairly far ranging effect, as in *Wright*, I do not think that the court should be anxious to give it the wide—almost revolutionary—meaning which the Commission's case involves. Indeed, I think there is force in [redacted] contention that all three members of the Court of Appeal in *Gregg* considered that s.62 should not be construed in such a way as to result in "[the] habendum ... enlarging the description of the parcels" (*per* Warrington L.J. at [1926] Ch. 533, see also at p.527 *per* Pollock M.R., and at p.535 *per* Sargent L.J., to the same effect).

66 Even if this is wrong, I do not consider that it has been established in the present case that that part of Beoley Lane adjoining the triangle was "appurtenant to" or "enjoyed with" the triangle, at the time of the 1971 conveyance. There was, I accept, one means of access (through a gate), so far as I can see it on the evidence, from the triangle directly onto Beoley Lane. However, the evidence suggests that Beoley Lane was not in fact used as a means of access to the triangle, whether directly from the lane or indirectly (*e.g.* through other land owned by [redacted] . It is clear that there were other means of access to the triangle, usable by [redacted] (namely from the north) and available to Redditch (namely from the east) as at the time of the conveyance. In my view, the furthest one can go is to say that that part of Beoley Lane adjoining the triangle is "appurtenant to" or "enjoyed with" the triangle because it was a highway, the soil of which was owned together with the triangle, and that really brings one back to the highway presumption.

67 Further, if it could be said that that part of Beoley Lane adjoining the triangle was appurtenant to, or enjoyed with, the triangle, I do not see why the rule in *Wheeld v Burrow* (1879) 12 Ch. D. 31 (referred to in the next section of this judgment) should not be sufficient to provide a purchaser of the triangle with appropriate protection. After all, on this hypothesis, it is hard to see why Beoley Lane would not also have been "appurtenant to" or "enjoyed with" [redacted] retained land to the north of the triangle It is far more likely and sensible, on this hypothesis, to conclude that he conveyed rights over the relevant part of Beoley Lane in the 1971 conveyance, rather than conveying the land itself, thereby depriving himself of any rights over it.

68 Accordingly, I conclude that that part of Beoley Lane which adjoins the triangle was included in the 1971 conveyance by virtue of the highway presumption, but, if that is wrong, it would not have been included by virtue of s.62. I turn then to the second issue which proceeds on the assumption that that part of Beoley Lane was not included in the 1971 conveyance, and was therefore retained by [redacted] and is now owned by the defendant.

THE SECOND ISSUE:

A Private Right of Way

69 The Commission contends that, when the triangle was conveyed to the Council by [redacted] the Council was granted, by implication, a right of way for all purposes over Beoley Lane for the benefit of the triangle, by virtue of the rule in *Wheeldon v Burrows*. This rule was quoted by Lord Wilberforce in *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] A.C. 144 at 168E–F in terms which I repeat (together with his emphasis):

> "On the grant by the owner of a tenement of part of that tenement *as it is then used and enjoyed*, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and *which have been and are at the time of the grant used* by the owners of the entirety for the benefit of the part granted"

70 In my view, this contention of the Commission must be rejected. There is, as I have mentioned, no evidence that, as at 1971, Beoley Lane was used as a means of access to, or egress from, the triangle, at all, let alone with vehicles, whether directly from the land itself, or indirectly (such as through other land owned by [redacted] . I am of that view even though the evidence establishes that there was a gate at one point from the lane to the triangle. The evidence establishes to my mind that as at 1971, Beoley Lane was occasionally used for motor cycling three or four times a year, by four or five people who liked travelling on challenging routes, and that one or two people in the vicinity may very occasionally have taken a stroll down parts of Beoley Lane. However, there is nothing to suggest that it was ever used, let alone with vehicles, in 1970 or 1971 by [redacted] his tenant, or anyone else, to obtain access to or egress from any part of his land adjoining or near Beoley Lane, and in particular the triangle.

71 I do not consider that the Commission's argument on this aspect is assisted by the fact that Beoley Lane may have been used in the past as a means of access to, or egress from, the triangle. As Lord Wilberforce emphasised, for the purpose of the rule in *Wheeldon -v- Burrows*, one is concerned with use which is contemporaneous with the date of the conveyance, and not with use in the past. Nor do I consider that the Commission's case is helped by the fact that Beoley Lane was a public highway. If anything, the fact that Beoley Lane was a highway suggests that there was no need for an implied private grant of a right to use the lane, given that there was a public right to do so (albeit that there is a dispute as to whether the public right extends to a carriageway use).

72 In these circumstances, I reject the Commission's argument, that, if the defendant owned Beoley Lane, the Commission has a private right of way over it. I turn to the third issue, which does not depend on the identity of the owner of Beoley Lane.

THE THIRD ISSUE:

Public Carriageway

The relevant legal and factual background

73 There is no dispute as to the basic highway law applicable in this case. First the definition of a highway. It is a way over which a public right of passage exists, for all Her Majesty's subjects at all seasons of the year to pass and re-pass, freely and at their will, without let or hindrance (Halsbury's Laws, 4th edition, re-issue, Vol.21, para.1).

74 Secondly, there are three types of highway: (i) A carriageway (also known as a cartway), over which there is a public right of way (a) on foot, (b) riding on, or accompanied by, a beast of burden, and (c) with vehicles or cattle. (ii) A bridleway, which is more limited, in that there is no right of passage with vehicles; often, there is no right to drive cattle over a bridleway either, but where there is such a right, the bridleway is often known as a driftway. (iii) A footpath, where the public's rights are limited to passage on foot (See Halsbury, *op. cit.* para.8 and *per* Lord Diplock in *Suffolk County Council Mason* [1979] A.C 705 at p.710.

75 Thirdly, until 1968, bicycles could only be ridden on carriageways, but, since 1968, the use of bridleways has been statutorily extended to bicycles by s.30 of the Countryside Act 1968.

76 Fourthly, a highway may be created by the common law doctrine of dedication and acceptance, or by statute. Dedication and acceptance can be express. However, it can also be inferred if the way in question has been used by the public, provided that the use has been for such a period and in such circumstances that the proper inference is that the owner of the soil has, by words or conduct, granted the right of passage to the public. (See Halsbury, *op. cit.*, at paras 65 and 78–80, s.31 of the Highways Act 1980, and *Attorney General and Newton Abbott -v- Dyer* [1947] Ch. 67 at 86–90).

77 Fifthly, if it is in issue whether or not a way is a highway, then the onus plainly lies on the person seeking to establish that the way has highway status. In this connection, it is clear that maps, plans and the history of the locality are admissible in evidence (see Section 32 of the Highways Act 1980 and Halsbury, *op. cit.*, at para.86). Sixthly, as can be gathered from Halsbury (*op. cit.*, at paras 83 and 90–93), it is clear that neither the existence of gates across a way nor the fact that cattle graze land over which the way runs, should be seen as being, of themselves, inconsistent with the existence of a highway. Seventhly, there is the well-established common law rule of "once a highway, always a highway". Obviously, that principle is subject to qualification, in the sense that statutory powers exist to extinguish or divert highways. However, that is not germane for present purposes, because there is no question of any such statutory powers having been exercised in relation to Beoley Lane.

78 With that background, I turn to the question of whether the Commission has established, on the balance of probabilities, that Beoley Lane is a carriageway. Before embarking on that inquiry, it is important to identify what is agreed, and what is in issue, between the parties as to the status of Beoley Lane. First, as I have mentioned, it is not in dispute that it is, and has been for over 275 years, a highway. The issue is whether it is a public carriageway (as the Commission contends) or (as the defendant argues) only a bridleway. Secondly, the defendant accepts that, although it asserts that Beoley Lane is not a public carriageway, it had been used, at least until the past few decades, as a private carriageway. In other words, the defendant accepts that Beoley Lane was (and presumably still is) subject to private rights of way with vehicles.

79 The parties rely on various strands of evidence as assisting on the issue whether, on the balance of probabilities, the court should presume that Beoley Lane was at some point in the past dedicated as a public carriageway. In this connection, it should be repeated that it is common ground between the parties that the evidence establishes that Beoley Lane is a bridleway, *i.e.* that the evidence establishes, on the balance of probabilities, that one can infer dedication of Beoley Lane sometime in the past as a bridleway. The relatively limited, but hotly contested, issue is whether the evidence establishes inferred dedication as a public carriageway, over and above, as it were, a bridleway.

80 There are a number of different factors which fall to be taken into account when considering this issue. Some of them required evidence of a very detailed nature relating to old maps, an enclosure award, tithe records, private maps, and Finance Act records. In this connection, in addition to the excellent submissions of counsel, I had the benefit of full and careful evidence from Dr Yolande Hodson, an expert map historian with impressive credentials, and Professor Roger Kain, who has an even more impressive curriculum vitae as an academic and writer in the field.

81 The first category of evidence consists of a number of maps published between 1728 and 1831 (and to which I shall refer as "the historical maps"). They are Beighton's Map of Warwickshire (1728), Jeffrey's Map of Warwickshire (1752), Kitchin's Map of Warwickshire (1770), Taylor's Map of Worcestershire (1772), Yates's Map of Warwickshire (1793), Greenwood's Maps of Worcestershire and Warwickshire (both 1822), Cary's Half Inch Map of England and Wales (1825)

and the first O.S. One-Inch Map of England (1831). I also include in this category the O.S. Drawing of 1814 prepared by Robert Dawson, Royal Military Surveyor and Draftsman, which resulted in the first O.S. Map, of 1831.

82 The second category of evidence consists of a map prepared in 1758 of the Gorcott Hall Estate; this map ("the 1758 Estate Map") was apparently prepared for the purposes of the owners of managers of the Estate at that time, and has never been published. Thirdly, there is the Inclosure Award and Inclosure Map of 1824. Fourthly, there are the Tithe Records for the parish of Beoley (1842 to 1844) and for the parish of Studley (1845 to 1847). Fifthly, there are particulars, which include a map, prepared in 1886 for a sale of the Beoley Estate, which adjoined both sides of Beoley Lane. Sixthly, there are records prepared in 1912 for the purpose of the Finance (1909–10) Act 1910. Seventhly, there are more modern maps, namely the 0.S. 1:2,500 First Edition (1883–4) and Second Edition (1903–5) and Bartholomew's Map of England (1901 and 1911). Eighthly, there are various conveyances and conveyancing documentation. Ninthly, there is oral evidence of reputation and of use. Tenthly, there is the position on the ground. Finally, there are the expert opinions.

83 While each of these aspects of the evidence has to be initially considered on its own, it must, of course, also be assessed in light of the other aspects. In the end, after considering all of these aspects together, I have to ask myself whether, bearing in mind that the onus of proof is on the Commission, I am satisfied on the balance of probabilities that the use and reputation of Beoley Lane was such as to justify the inference that it was dedicated as a public carriageway.

Discussion

84 So far as the historical maps are concerned, they satisfy me that Beoley Lane has existed as an identified way consistently from 1722 or 1723 (when Beighton actually drew up his plans). With one exception, namely Yates, all the historical maps show a road substantially in the location of Beoley Lane, although it is right to say that a number of the maps identified a different route, sometimes a radically different route, at its southern end. So far as Yates is concerned, Professor Kain realistically did not suggest that it cast doubt on the existence of Beoley Lane in the 18th century, but, not unfairly, he suggested that its absence tended to suggest that Beoley Lane was not a particularly important or highly used road. I consider that the fact that the recorded route of Beoley Lane varied, particularly at its southern end, in various maps is explicable by the inevitable inaccuracies in old maps.

85 Particularly, given that it is common ground that Beoley Lane was a highway, at least to the extent of being a bridleway, and that. it was in fact used by vehicles (albeit that the Professor's case is that it was because it was subject to private rights of way for vehicles) it is impossible to draw confident conclusions from any of the historical maps as to whether or not Beoley Lane was indicated thereon as a public carriageway. However, it appears to me that there is one factor which provides a little support for the Commission's case. One of the historical maps, namely Cary, does tend to suggest that Beoley Lane was a public carriageway. This is because it was denoted as a "parochial road". Whether one judges that expression by

reference to terms which seem to have been used in the early 19th century, or by reference to other expressions used by Cary, it is by no means clear what it means. However, as Professor Kain fairly accepted in cross-examination, Dr Hodson's view that it meant a public carriageway was a little more likely than his explanation, which was to the effect that it meant a non-vehicular highway.

86 The interrelationship of two of the published maps, namely Dawson (1814) and Greenwood (1822), and the 1758 Estate map raises a point of some interest to interpreters of historical maps. The two published maps appear to show the southern end of Beoley Lane ending at the point that it joins the Common, rather than going across the common and joining the Birmingham Road. As Professor Kain said, that might have been a factor militating against Beoley Lane being a public carriageway, on the basis that it would have been primarily used as a means of access to, and egress from, the Common, rather than to and from the Birmingham Road as well. Initially, Dr Hodson thought that this could be explicable on the basis of a mistake on the part of Dawson and Greenwood. However, for the first time when in the witness box, she suggested that there might be a cartographic convention, adopted by at least some map makers in the 18th and early 19th centuries, which involved not marking a non-metalled highway (or, presumably, private road) when it crossed a common or a heath. (In this connection, it should be explained that a road is not metalled when its surface is no more than beaten earth. It is metalled if it is covered with anything from thick asphalt over a foundation, at one extreme, to loose chippings, at the other extreme).

87 Although initially inclined to dismiss this suggestion as heretical, Professor Kain, although still sceptical, was prepared to accept, on further examination, that the suggestion had more force than he had at first supposed. Given that the suggestion was, as it were, sprung on him at the hearing for the first time, it is not to the discredit of Professor Kain that he modified his attitude; on the contrary. Dr Hodson's hypothesis is supported by two factors. First, the 1758 Estate Map makes it clear, as Professor Kain fairly accepted, that Beoley Lane did track a defined route over the common to the Birmingham Road. Secondly, it would seem that the convention may well have been adopted by Dawson and Greenwood in relation to a significant number of other heaths and commons on the same page of their respective maps as contained Beoley Lane. That is only a matter of inference, but, on a fair number of occasions, one can see a road coming onto a common or heath precisely opposite another road on the other side of the common or heath, and a fair inference would be that those using either road to cross the common or heath would naturally walk or ride along the shortest distance joining the two points.

88 However, it is fair to say that Dr Hodson's hypothesis is called into question to some extent by the fact that another highway, Common Lane, is shown, unlike Beoley Lane, going over the common, by Dawson and Greenwood, and that Common Lane was not. metalled in the 1880s. However, as [redacted] says, this may well be explicable on the basis that Common Lane was, as it were, loosely metalled, e.g. with loose stones, in the early part of the 19th century, and that all the loose stones had been washed away and not replaced by the latter part of the 19th century.

89 On the basis of the documentary evidence, particularly the 1758 Estate Map, and

on the basis of Professor Kain' s acceptance that Beoley Lane had a visible vehicular route across the common, and, indeed, that members of the public would not have had a right to stray on the common, I have reached the conclusion that Dr Hodson's notion of a cartographic convention is in fact correct. In case this decision is of interest to cartographic historians, it should be emphasised that I have reached this view on the balance of probabilities, and on the basis of the documentary, oral and expert evidence, as well as the arguments, advanced before me.

90 Apart from the aspect just considered, I am of the view that the 1758 Estate plan is independently supportive of the contention that Beoley Lane was a public carriageway. It is described on the plan as "the lane leading from Mappleborough Green to Holt end". This description, coupled with the fact that the lane is shown joining the Birmingham Road, appears to me to be an indication, albeit not a decisive indication on its own, of public carriageway status. It was agreed between both experts that the designation "from X" or "to X" on a road was indicative of highway status. A specific description of a lane as leading from one village to another, particularly when one bears in mind that it was a carriageway (albeit that its status as a public carriageway is in issue) does provide some support for the notion that it was a public carriageway.

91 The Inclosure Award of 1824 is concerned with a relatively small part of Beoley Lane, namely the very south-eastern end. However, given that the issue between the parties concerns whether or not Beoley Lane is a carriageway, it seems clear that the highway status of this part of Beoley Lane cannot be any different from the rest of Beoley Lane. Further, the Inclosure Award does refer to the whole of Beoley Lane at least in one place.

92 Two passages in the Inclosure Award are particularly relevant. First, the south-eastern end of Beoley Lane was awarded as "a private carriage road and driftway"; secondly, the whole of Beoley Lane was described in the Award as "a private carriage road from Beoley to Mappleborough Green". It is common ground that, in light of the provisions of the Inclosure Act 1801, that, if Beoley Lane was a public carriageway at that time, the Inclosure Award cannot have deprived it of that status.

93 In *Dunlop v Secretary of State for the Environment* (1995) 70 P & CR 307, Sedley J. considered, and rejected, a suggestion (which had been advanced in an article), that the description in an Inclosure Award of a route as a "private carriage road" might mean a road which was open to any member of the public using a private carnage He held that the natural meaning of the expression "private carriage road", whether at the present time or at the time that Inclosure Awards were made, was a private road (as opposed to a public highway) for carriages. Realistically, [redacted] does not seek to depart from that interpretation in relation to the instant Inclosure Award. There is no doubt, therefore, that the description of Beoley Lane, as a "private carriage road" in the Inclosure Award, is a substantial factor against it's being a public carriageway, at least as at the date of the Award. First, if it had been a public carriage road, then, almost by definition, it could not also have been a private carriageway, because it would have been meaningless to grant anyone a private right of way for a certain purpose if he

already had that right as a member of the public. Secondly, unlike those who prepared the historical maps, the Commissioner who prepared the Inclosure Award and the Inclosure Map was performing a statutory duty, and was concentrating on a relatively small area, for which he had to provide a detailed Award. Thirdly, the Commissioner did award or confirm certain other roads as "public carriage roads". Furthermore, it is clear that he "walked" the area the subject of the Award (and, indeed, it is clear from his ambulatory report that Beoley Lane was not of particular significance, because he did not even refer to it in a fairly full report).

94 On the other hand, in any field of human endeavour, mistakes can be made, even if the greatest care has been, or should have been, taken. In that connection, [redacted] Lewison raises a number of reasons for doubting the accuracy of the Inclosure [redacted] While they have some force, I do not consider that, at any rate by themselves, they would justify the conclusion that the Inclosure Award is not strong evidence that, at least as at 1824, Beoley Lane was not a public carriageway. First, he says that the description of Beoley Lane was incomplete, imprecise, and possibly inaccurate. The description of Beoley Lane as a "private carriage road and driftway" is incomplete, in the sense that there is no reference to Beoley Lane being a highway, which, on any view, it was, as the defendant accepts that it was a bridleway. However, it is clear that nothing done or awarded by the Commissioner could impinge on the highway status of Beoley Lane, so it does not appear to me overwhelmingly significant that its highway status was not described.

95 Further, the description as a "driftway" is said to be ambiguous or inaccurate, in the sense that, either, "private" governs the word "driftway", as well as the words "carriage road", in which case it is inaccurate, or the Commissioner intended "driftway" to imply public use, in which case the drafting is ambiguous. There is undoubtedly force in that point, as far as it goes, but it cannot fairly be said seriously to undermine, the point that the description as a "private carriage road" is not sensibly possible to reconcile with the notion that it was a "public carriage road". The same point may be made about [redacted] next criticism, namely that, although Beoley Lane was described as a "private carriage road", there was no indication in the Award of the class of persons entitled to use it. Again, there is force in that point, but it does not follow from it that one should presume that the Commissioner was unaware of the difference between a public carriage road and a private carriage road. (I note that, in *Dunlop*, the Award also referred to a "public carriage road" without identifying the dominant tenements—see at 70 P. & C.R. 311—and that the description of a road as a driftway, in the context of "private carriage roads and driftways" appears to have been accepted as being a reference to a private driftway—see at 313).

96 It is also relevant to mention that the Inclosure Map effectively forming part of the Inclosure Award has the words "from Beoley" annotated at the northern end of the section of Beoley Lane included in the Inclosure Award. It is common ground between Professor Kain and Dr Hodson that such an annotation was some evidence that Beoley Lane was a public highway, even a public carriageway, notwithstanding the designation of the route as a private carriage road in the Award.

97 Further, the fact that Beoley Lane was not even described as being a bridleway

tends to support the view that the Commissioner did not direct his mind to the nature and extent of any public rights of way over Beoley Lane. There is also something in [redacted] point that, at least on the evidence available, it seems likely that the Commissioner did not go beyond the parish boundaries of Studley, and in particular did not investigate the northern part of Beoley Lane, in the parish of Beoley. That is of itself not surprising, bearing in mind the Commissioner's function, but, had he appreciated that Beoley Lane joined a highway at its northern end, he may have reconsidered his apparent view that it was not a public carriageway. If Beoley Lane was a public carriageway as at 1824, it is conceivable that this was overlooked by the Commissioner, because, for instance, the point was not raised with him by anybody with whom he discussed the matter, or because he never considered the possibility. However, the fact remains that his Award, which appears otherwise to have been a carefully considered document, does describe Beoley Lane in such a way as to make it clear, albeit by implication, that he did not consider that it was a public carriageway, and that is a strong factor in support of the proposition that it was not a public carriageway as at 1824.

98 I turn to the Tithe Maps. There is a marked difference between the Studley Tithe Map and the Beoley Tithe Map. The Beoley Tithe Map shows the northern section of Beoley Lane as an enclosed route on which no Tithe rent-charge was apportioned. Accordingly, it follows that Beoley Lane was treated as having highway status in this Tithe Map. However, I do not consider that the Tithe Map takes matters further, at least on its own, because the evidence is consistent with Beoley Lane being a bridleway just as much as a carriageway.

99 The Studley Tithe Map, on the other hand, indicates that the southern end of Beoley Lane was owned by two individuals, that it was farmed as pastureland, and that Tithe rent-charge was apportioned to it. Although Professor Kain suggested that this evidence supported, possibly strongly, the contention that Beoley Lane was not a public carriageway, I do not believe that any such conclusion is justified. In the first place, such a treatment of Beoley Lane is not, as Professor Kain admitted, inconsistent with Beoley Lane being a public carriageway. Secondly, there are features of the Studley Tithe Map, particularly the annotation at the northern end of the southern section of Beoley Lane in Studley parish, "from Beoley", suggesting that Beoley Lane had public status. Thirdly, it would be plainly unsafe to rely upon the Studley Tithe Map as having this effect, as it is inconsistent with the Beoley Tithe Map.

100 In my view, other than serving to confirm what is, in any event, agreed between the parties, namely that Beoley Lane was a highway, the Tithe Maps, at least taken on their own, do not assist on the point at issue between the parties, namely whether Beoley Lane is or was a public carriageway.

101 I turn now to the Sales Particulars, prepared in respect of the Beoley Hall Estate by estate agents, Chesshire Gibson Son & Fowler of Birmingham for a sale on August 17, 1886. These particulars run to over ten pages which describe a total of 12 plots. Lot 4 is described, in part, in these terms:

> "This Property has considerable frontages to a Road leading from Beoley to the Birmingham and Alcester Road, and to a Road leading from Beoley to Mappleborough Green . . ."

102 There is no doubt that the "Road" leading from Beoley to the Birmingham and Alcester Road is a public carriageway. Accordingly, I accept that the description of Beoley Lane in the same sentence as "a Road leading from Beoley to Mappleborough Green", is some indication that Beoley Lane was similarly regarded as a public carriageway. Further, the expression "a Road" in today's parlance would tend to suggest a public carriageway, although I quite accept that that is not necessarily so, and, in any event, that I am concerned with construing a document prepared in 1886.

103 Additionally, it is to be noted that none of the 12 plots was described as including any part of Beoley Lane, or as having any private rights of way over Beoley Lane. It seems to me that that is another indication that Beoley Lane was a public carriageway. If, as the Commission contends, Beoley Lane was a public carriageway, then it was natural to describe it as a road, and there was no need to mention any possibility of rights of way over it. However, if, as the defendant contends, Beoley Lane was not a public carriageway, but a public bridleway, subject to private rights of way with vehicles, then one would have expected that to have been referred to in the particulars, because it would have been a beneficial feature of those plots which abutted Beoley Lane. In this connection, Professor Kain realistically accepted that it was inconceivable that, for instance, lot 4 would not have enjoyed a vehicular right of way, whether private or public, over Beoley Lane.

104 On the other hand, the plan attached to the 1886 particulars does have one road marked as "public road", which the defendant says is an indication that roads not so marked are not public roads. However, there are other roads on the plan which, like Beoley Lane, are given no description, and yet were clearly public roads. I believe that the explanation for a single road being specifically described as "public road" is because it runs through one of the lots, lot 12, which was described in the particulars as "being entirely within a Ring Fence", and the estate agents were anxious to draw the attention of prospective purchasers to the fact that the Ring Fence was not, as it were, complete, in that a public road went through the lot.

105 The next category of evidence I propose to consider are the maps prepared pursuant to the provisions of the Finance (1909–10) Act 1910, which provided for the levy of a charge on the increment value of land, which was based on the value of the land after April 30, 1909. The 1910 Act allowed certain deductions, including reduction in the value of the land as a result of any "public rights of way or any public rights of user". Maps and other records were prepared pursuant to the 1910 Act. Except for two small sections, it is clear from the map prepared around 1912 that Beoley Lane was treated as public land for the purposes of the Act. Professor Kain suggested that the fact that two parts of Beoley Lane were not shown as public land was impossible to explain, unless it demonstrated in some way that Beoley Lane may not have been subject to a public right of way I find that impossible to accept. The defendant, and indeed Professor Kain, agree that Beoley Lane was subject to public rights of way, and, therefore, the fact that it is not shown as public land in two places is only sensibly explicable on the basis of oversight. The existence of oversight is reinforced by the fact that there is no record of the two landowners concerned having claimed any reduction in liability for tax owing to

the existence of public, or even private, rights of way over that part of Beoley Lane they owned. On any view, they must simply have overlooked their rights, and there was clearly a mistake.

106 Dr Hodson provided a detailed analysis of the practice of surveyors, and indeed the instructions given to surveyors, when preparing such Finance Act plans, and concluded that the maps tended, if anything, to support the conclusion that Beoley Lane was a public carriageway and not merely a bridleway. This was on the basis that, at least to a large extent, Beoley Lane was shown uncoloured, excluded from adjacent hereditaments, and plainly wide enough to carry vehicles. I accept that these factors tend to suggest that Beoley Lane was treated as a public carriageway in the Finance Act maps, but I do not regard it as a strong point. The maps are not unambiguous in this regard, and they appear to have been prepared in something of a hurry. Further, as both experts rightly accepted, there are inconsistencies in the way different parts of Beoley Lane are treated. Accordingly, at least if taken on their own, the Finance Act maps are of only slight value in tending to support the Commission's case.

107 I turn to consider the more modern published maps. The O.S. 1:250,000 Map of England was originally published in sheets in 1883–4, and a second edition was published in 1903–5. Professor Kain and Dr Hodson agreed that, in each of the two editions, the representation of Beoley Lane, while consistent with a carriageway, was also consistent with the status of a public bridleway over a private road. They also agree that Beoley Lane is depicted as a vehicular route. Dr Hodson suggested, or, perhaps more accurately, speculated that the marking of "spot heights" on a couple of places in Beoley Lane might tend to support the contention that it was a public carriageway rather than a bridleway. Although it would be wrong to dismiss the point as hopeless, I think it is too speculative on which to found any conclusion as to the status of Beoley Lane.

108 Bartholomew's Map of England, 1901 and 1911 editions, has three categories of coloured roads. They are "first class roads", "secondary roads (good)", and "indifferent roads (passable)". There are two other categories, namely uncoloured roads and "footpaths & bridlepaths". Beoley Lane is marked in each of the two editions as uncoloured road. The legend to each of the Bartholomew maps states that "the uncoloured roads are inferior and not to be recommended to cyclists". The implication of the demarcation of Beoley Lane on these maps appears to me to be that they are public carriageways. First, each of the other four categories is a public highway. Secondly, in a somewhat paradoxical way, the indication in the description of the uncoloured road is that they can lawfully be used by cyclists, which, as at 1901 and 1911, would have meant that they were public carriageways. However, it is important to mention that there is a note to the effect that "the representation of a road or footpath is not evidence of the existence of a right of way". I do not consider that that means that one can cast aside what one could otherwise glean from Bartholomew as being of assistance, but the disclaimer underlines the fact that one cannot place much weight on Bartholomew's Maps, or indeed on any map which does not have the positive function of identifying public carriageways.

109 I do not think that it is helpful to consider published maps later than the 1905

O.S. Map and the 1911 Bartholomew's Map. That view appears to be supported by the expert views of Professor Kain and Dr Hodson

110 I turn to the conveyancing documentation. In this connection, there is a conveyance of the Gorcott Hall Estate dated September 29, 1898, which refers to that part of Beoley Lane, which adjoins that Estate as being included in the conveyance. There is nothing in the 1898 conveyance to suggest that Beoley Lane was subject to private rights of way in favour of third parties, and there is nothing in the 1898 conveyance to indicate that the Gorcott Hall Estate had rights of way over those parts of Beoley Lane not included in the sale. In my view, that is significant. If, as the Commission contends, Beoley Lane was throughout a public carriageway, then conveyancing practice would not have required a vendor expressly to convey any part of Beoley Lane subject to public rights, and it would certainly not have been necessary for the Estate to have been conveyed with the benefit of public rights of way over the remainder of Beoley Lane. On the other hand, if Beoley Lane was subject to private rights of way, the vendor under the 1898 conveyance would have been at risk of being in breach of his covenants of title if he had conveyed that part of Beoley Lane forming part of the Estate without stating that it was subject to private rights of way. Further, on that basis one would have expected the conveyance to have included such private rights of way over the remainder of Beoley Lane as the Estate enjoyed.

111 Indeed, this argument can, as it were, be related back from 1898 to 1823. That is because the property conveyed by the 1898 conveyance is described therein by reference to an "Indenture of Settlement and Bond" of 6th September 1823. The point that can be made in relation to the 1898 conveyance can also be made in relation to conveyances dated December 16, 1912, April 25, 1946, December 14, 1948 and January 10, 1966. Each conveyance involved land abutting Beoley Lane being conveyed, and none of them referred to the land having the benefit of rights of way over any part of Beoley Lane not included in the conveyance, or, in so far as any part of Beoley Lane was included in the land being conveyed, as that part of Beoley Lane being subject to private rights of way.

112 The witnesses of fact tend to support the contention that Beoley Lane is a public carriageway, in two respects. First, there is evidence of use by members of the public of Beoley Lane as a carriageway during the period between the 1930s and the early 1970s. It is fair to say that the evidence of such use is fairly exiguous, and the Commission does not suggest that, on its own, it could possibly support the contention that Beoley Lane is a public carriageway. Nonetheless, I am satisfied that during the period from about 1930 to about 1974, Beoley Lane was used from time to time by members of the public riding bicycles, motorbikes, and tractors. The extent of this use may not, however, have been such as to render it particularly remarkable that there was no objection if Beoley Lane was not a public carriageway. However, the fact remains that there is evidence to support the notion that, for more than 40 years before the construction of the Coventry Highway, Beoley Lane was consistently (if not intensively) used as a public carriageway.

113 The other aspect of the oral evidence concerned the past use or reputation of Beoley Lane. One of the witnesses, who was cross-examined, was a Miss Angela Aldington, who lived at Lower House Farm with her parents from 1930 to 1942,

when they were evicted in rather sad circumstances connected with the Second World. War. Around the time that her family was evicted, she drew an impressively detailed plan of Lower House Farm, which she has kept. Although she could not give much first hand evidence as to the use of Beoley Lane, she remembers it being known as "Old Lane" (as indeed it is marked on her plan). She clearly believed that Beoley Lane constituted a public road, and she had been told this by her grandmother. Indeed, the Aldington family believed Beoley Lane to have been a Roman road. It appears likely that what was passed on to Miss Aldington was based on information which could have gone back to at least 1847, when members of the Aldington family are shown as occupiers of part of Beoley Lane and land adjoining Beoley Lane in the Studley Tithe Records. It is fair to record that she could not specifically remember any vehicles using Beoley Lane, but she thought that they probably would have done. The evidence of the other witnesses of fact was either consistent with Miss Aldington's evidence on this point, or was not inconsistent therewith.

114 The position on the ground is a factor which was emphasised on behalf of the Commission, both in the evidence of Dr Hodson and in the submissions of [redacted] In this connection, the following features are in point. Until the construction of the Coventry Highway in the early to mid 1970s, Beoley Lane connected two long-standing villages, namely Holt End (and Beoley) and Mappleborough Green, which were not merely in different parishes, but in different counties. Secondly, with the exception of Lower House Farm, there were no buildings along its route. Thirdly, at least for the past 300 years or so, Beoley Lane has been of sufficient width to accommodate vehicular traffic, and, indeed, it is common ground that it did accommodate vehicular traffic. There is evidence of vehicular use as long ago as the early 18th century, and (particularly bearing in mind that bicycles were treated as vehicles for this purpose until 1968) of not insignificant vehicular use during at least the early part of the last half-century. Fourthly, Beoley Lane was level, and it appears to have been hedged on either side almost throughout the whole of its route. (There seems to have been one field abutting Beoley Lane which did not have a hedge separating it from the lane). Fifthly, Beoley Lane is shown on a number of historic maps as a road. Sixthly, there was no obvious mechanism, so far as the evidence goes, whereby members of the public could have been prevented from using Beoley Lane for vehicular purposes.

115 In my judgment, what I have called the position on the ground provides some further support for the Commission's case that Beoley Lane is a public carriageway. The various features identified, when taken together, render it inherently more likely that Beoley Lane was a public carriageway, especially bearing in mind that the position on the ground, as I have described it, appears to have obtained continuously since before 1722 until the middle of the last century. Beoley Lane was a means of access between two villages in different counties, each of which was on a public carriageway, and it had the capability of being, and indeed was used as, a carriageway. There appears to have been nothing to prevent members of the public wishing to use Beoley Lane as a vehicular means of getting to or from the carriageway or village at either end. Apart from visiting, or leaving,

Lower House Farm, Beoley Lane was not a means of access to, or egress from, buildings, a point emphasised by the hedges on either side of Beoley Lane.

116 The use of Beoley Lane has progressively diminished since 1930, and probably earlier. The fact that its use appears to have lessened progressively does not bear on the argument. Since the construction of the Coventry Highway, it is scarcely surprising that, with the exception of the first 300 metres or so, that part of Beoley Lane south of the Coventry Highway has not been used at all, and has become overgrown and almost impassable I should add that the fact that Beoley Lane became progressively less used over the past 50 or 60 years seems to be supported by the fact that an assessment has been carried out on the trees in Beoley Lane, and it appears to me that a significant number of those trees are of an age of 40 years or less.

117 The final aspect I must turn to is the expert opinion Professor Kain was of the view, that the net effect of the evidence that he considered showed that Beoley Lane was not a public carriageway, and Dr Hodson came to the opposite conclusion. Each of these experienced and knowledgeable witnesses was undoubtedly giving his or her honest opinion based on a great deal of evidence spread over the last 280 years, much of which evidence was notable more for its academic interest and detail than for the help it provided in relation to the case (through no fault of either expert). Some justified criticisms of each expert were made both in the course of his or her cross-examination, and in the course of counsel's respective closing speeches. I do not find it entirely easy to decide which of the two views I prefer (ignoring for the moment, in so far as it is possible to do so, the weight to be given to the other ten points I have been discussing. In a way, this is a somewhat unreal exercise, because I have inevitably formed certain views as to the conclusions to be drawn from the other aspects of the evidence. There is obviously a risk of those conclusions influencing my assessment of the two experts).

118 While, as I think Dr Hodson would acknowledge, Professor Kain has greater authority and expertise on many aspects of historic cartography, I have come to the conclusion that Dr Hodson's evidence and conclusion has stood up better than those of Professor Kain. First, it appears to me that she came to her conclusion on the basis of a wider body of evidence than Professor Kain. Thus, in reaching her conclusion, she took into account the 1758 Estate Map, the 1886 Sale Documents, and the conveyancing documentation, as well as the oral evidence, all of which were largely ignored by Professor Kain. [redacted] says, with some force, that Professor Kain's approach was correct, because, like Dr Hodson, he was an expert on old cartography, not on conveyancing documentation, private estate maps, or oral evidence. However, I think that that takes too limited a view of a cartographical historian's function. It seems to me that Dr Hodson was right to say that, when interpreting old maps, one does seek to take into account all the evidence which is available. It may well be that cartographical historians are, in terms of their expertise and experience, on firmer ground when looking at published old maps, than, say, conveyancing documents, but that does not mean that they should not, indeed would not, look at conveyancing documents for assistance in interpreting old maps.

119 Secondly, I cannot overlook the fact that Professor Kain misinterpreted a Tithe Map, which led him to believe that there might have been another route between Holt End and Mappleborough Green, in addition .to Beoley Lane. [redacted] rightly points out that this is of particular significance, in the sense that Professor Kain is a particular expert on the interpretation of Tithe Maps. Having said that, it is scarcely surprising if an expert, even one as eminent as Professor Kain, makes a mistake. Furthermore, it is entirely to his credit that Professor Kain made no bones about the fact that he had made a mistake in this regard, when it was pointed out by Dr Hodson.

120 Thirdly, at the end of his main report, Professor Kain helpfully set out factors which, on the one hand, suggested that Beoley Lane was not a public carriageway, and, on the other hand, which suggested that it was a public carriageway Of the eight factors which he said suggested that Beoley Lane was not a public carriageway, I believe that only one has real force, and that is the Inclosure Award and Map, the other seven factors have, to my mind, been established as being either quite inconclusive, or (in the case of Bartholomew's Maps) actually of assistance to the argument that it was a public carriageway. Professor Kain identified four factors, which tended to point in favour of Beoley Lane being a public carriageway (although it is fair to say that at least some of them are equally consistent with Beoley Lane being a bridleway). However, in addition to not referring to the 1758 Estate Map, the Beoley Estate Sales Particulars, and the witness evidence (all of which tended to support the Commission's case), Professor Kain did not refer to Cary's Map (which also provides a little support for the contention that Beoley Lane was a public carriageway), or conveyances.

121 This is not to say that [redacted] evidence escaped unscathed from cross-examination. I think that the general criticism that can be made of her evidence is that she was too academic, in the sense that she was trying to squeeze out, to an unrealistic extent, every conceivable point from each of the historical maps that might possibly suggest that Beoley Lane was or was not being treated as a public carriageway. As an exercise in thoroughness, even at times in ingeniousness, it was admirable. However, at least in my view, a great number of the points she made were of no real assistance, as Mr Randall's cross-examination demonstrated.

122 Nonetheless, the fact remains that, if one strips away the more tentative and contemplative points raised by Dr Hodson, it seems to me that she did cast her net more widely and put forward all points that could have been put forward (albeit that there were many more besides) from the various maps and other documents. Furthermore, it is fair to her to record that her ingeniousness did result in one new thought, namely the way in which non-metalled roads may have been shown on some maps in the early 19th century when crossing heaths and commons. All in all, therefore, I think that her conclusion stood up better than that of Professor Kain, and, equally, viewing it, as far as possible, as detached from the conclusions I have reached on the other aspects of the evidence, her opinion seemed more convincing.

123 Drawing together the various disparate, but often connected, strands of evidence relating to the issue of whether or not Beoley Lane is a public carriageway, I have reached the conclusion that the Commission has discharged the onus of proof upon

it, i.e. that it has established that, on the balance of probabilities, Beoley Lane was a public carriageway. Of all the various pieces of evidence, only one points the other way to my mind, and that is the Inclosure Award and Map of 1824. The mere fact that there are a fair number of other pieces of evidence all of which tend to point the other way does not of itself mean that the Inclosure documentation is outweighed. Obviously, it is not a case of seeing which of the parties has identified more separate pieces of evidence. One piece of high quality, or convincing, evidence will frequently outweigh a large number of pieces of low, or weak, quality evidence. However, on this occasion, bearing in mind the quality of the various items of evidence pointing in favour of Beoley Lane being a public carriageway, I consider that they do outweigh the effect of the Inclosure documentation. While the Inclosure documentation does represent powerful evidence, it is not unequivocal, not least because the Commissioner would not have been ultimately concerned with whether Beoley Lane was a public carriageway or not: as I have mentioned he would not have had the power on his own to discharge it from such status. In my view, the weight of the evidence the other way leads to the conclusion either that an error was made in the Inclosure Award and Map, or that Beoley Lane became a public carriageway subsequent to 1824. If it needs to be decided, I incline to the view that the former alternative is correct.

Conclusion

124 In these circumstances, I conclude that:

i) The highway presumption, but not s.62, has resulted in Beoley Lane being vested in the Commission, through the medium of the 1971 conveyance, and it has therefore not been acquired by the defendant;

ii) If that is wrong, and Beoley Lane is owned by the defendant, the Commission cannot claim any private vehicular right of way over Beoley Lane;

iii) In any event, the evidence establishes that, on the balance of probabilities, Beoley Lane is a public carriageway.

Order accordingly.

Reporter—David Stott.

Appendix 13

Fortune v.Wiltshire Council [2012] EWCA Civ 334

Court of Appeal

*Fortune and others *v* Wiltshire Council and another

[2012] EWCA Civ 334

2012 March 5, 6, 7, 8; 20 Arden, Longmore, Lewison LJJ

Highway — Right of way — Mechanically propelled vehicles — Highway authority required to maintain list of highways maintainable at public expense — Statute extinguishing public rights of way for mechanically propelled vehicles not shown as such on definitive map and statement subject to exceptions — Extinguishment not to apply where right of way shown in highway authority's list of highways maintainable at public expense — Local authority maintaining inaccurate list of such highways on electronic database only — Whether "in writing" and "deposited" at authority's offices — Whether amounting to list for purposes of exception — Disputed highway shown on database — Whether public's right to use highway with mechanically propelled vehicles extinguished — Interpretation Act 1978 (c 30), s 5, Sch 1 — Highways Act 1980 (c 66) (as amended by Local Government Act 1985 (c 51), s 8, Sch 4, para 7 and Local Government (Wales) Act 1994 (c 19), s 22(1), Sch 7, para 4), ss 36(6)(7), 320 — Natural Environment and Rural Communities Act 2006 (c 16), s 67(1)(2)(b)

Against the objection of local residents, planning permission was granted for the building of a large number of houses on land adjoining a lane which was highway. The relevant sections of the lane were not shown in the definitive map and statement of "roads used as public paths", which Part IV of the National Parks and Access to the Countryside Act 1949 required county councils to maintain, but they were shown as a road maintainable by the local authority in a record on the authority's electronic database. The claimants, who owned properties fronting the lane, brought proceedings against the local authority and one of the developers, alleging that the lane was not a public vehicular highway and that the public were restricted to using it on foot and on horseback and were not entitled to use it with mechanically propelled vehicles on the basis that, even if the lane had been a public vehicular highway before 2006, the public's right to use it with mechanically propelled vehicles had been extinguished by section 67 of the Natural Environment and Rural Communities Act 2006[1]. Section 67(1) provided for the extinguishment of existing public rights of way for mechanically propelled vehicles over ways which were either not shown in the definitive map and statement, or which were shown there only as footpaths, bridleways or restricted byways but, by subsection (2)(b), subsection (1) did not apply to an existing public right of way if immediately before commencement of the Act it was not shown in the definitive map and statement but was shown in a list of highways maintainable at public expense required to be kept under section 36(6) of the Highways Act 1980[2]. A list made in accordance with section 36(6) was required by section 36(7) to be "kept deposited" at the authority's offices. The judge held that (i) the list of streets kept by the local authority in electronic form satisfied the requirement in section 320 of the 1980 Act that documents required to be kept under that Act be "in writing", construed accordingly with Schedule 1 to the Interpretation Act 1978[3], and (ii) the public's right to use the relevant sections of the lane with mechanically propelled vehicles had not been extinguished by section 67(1) of the

[1] Natural Environment and Rural Communities Act 2006, s 67: see post, paras 136, 137.
[2] Highways Act 1980, s 36(6)(7), as amended: see post, paras 139, 140.
S 320: see post, para 164.
[3] Interpretation Act 1978, s 5: "In any Act, unless the contrary intention appears, words and expressions listed in Schedule 1 . . . are to be construed according to that Schedule."
Sch 1: see post, para 165.

A 2006 Act because the records in the electronic database of streets maintained by the authority constituted a list of highways maintainable at public expense for the purposes of section 36(6) of the 1980 Act and so the specific exception provided by section 67(2)(b) applied.

On the first claimant's appeal—

Held, (1) that, having regard to the definition of "writing" in Schedule 1 to the Interpretation Act 1978, records in an electronic database were "in writing" for
B the purposes of section 320 of the Highways Act 1980; that, therefore, the list of streets which were highways maintainable at public expense kept on the local authority's database was a list which section 36(6) of the 1980 Act required it to make, notwithstanding that it was not kept in physical form; and that, construing the word "deposited" in section 36(7) accordingly, the list was "kept deposited" at the authority's offices as required by section 36(7) (post, paras 163, 164, 165–167).

(2) Dismissing the appeal, that the judge had been justified in concluding that,
C prior to the coming into force of the Natural Environment and Rural Communities Act 2006, the lane had been a vehicular highway, dedicated at common law, across its full width; that section 67(2)(b) of the 2006 Act required merely that a list made and kept under section 36(6) of the Highways Act 1980 should exist and that the right of way was shown in it, not that the list be fully compliant with section 36(6); that, since the purpose of section 67(2)(b) of the 2006 Act was not to protect vehicular rights of way from being extinguished only where there was an accurate list under section 36(6) of the 1980 Act but to give effect under section 67(1) to the
D concern about mechanically propelled vehicles misusing green lanes, the fact that the list might be defective, need correcting, omit necessary information or contain an erroneous entry did not prevent it retaining its character as a list of streets made and kept under section 36(6) for the purposes of section 67(2)(b) of the 2006 Act; and that, accordingly, since the lane was shown in the list kept on the authority's electronic database, section 67(1) of the 2006 Act did not apply and the public vehicular rights of passage over the relevant sections of the lane had not been
E extinguished thereby (post, paras 123, 127, 128–129, 159–160, 161, 162, 163, 168, 169).

R (Warden and Fellows of Winchester College) v Hampshire County Council [2009] 1 WLR 138, CA distinguished.

Decision of Judge McCahill QC sitting as a judge of the Chancery Division affirmed.

F The following cases are referred to in the judgment of the court:

Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2002] EWCA Civ 1642; [2003] 1 WLR 577; [2003] 1 All ER (Comm) 140, CA

Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23; [2007] 1 WLR 1325; [2007] Bus LR 129; [2007] 4 All ER 765 HL(E)

Fairey v Southampton County Council [1956] 2 QB 439; [1956] 3 WLR 354; [1956] 2 All ER 843, CA

G *Folkestone Corpn v Brockman* [1914] AC 338, HL(E)

Leigh v Jack (1879) 5 Ex D 264, CA

Maltbridge Island Management Co Ltd v Secretary of State [1998] EGCS 134

Mann v Brodie (1885) 10 App Cas 378, HL(Sc)

Micklethwait v Newlay Bridge Co (1886) 33 Ch D 133, CA

Moser v Ambleside Urban District Council (1925) 23 LGR 533, CA

Oxfordshire County Council v Oxford City Council [2004] EWHC 12 (Ch); [2004]
H Ch 253; [2004] 2 WLR 1291

R v Exall (1866) 4 F & F 922

R v Secretary of State for the Environment, Ex p Hood [1975] QB 891; [1975] 3 WLR 172; [1975] 3 All ER 243; 73 LGR 426, CA

R (Maroudas) v Secretary of State for the Environment, Food and Rural Affairs [2010] EWCA 280; [2010] NPC 37, CA

R (Smith) v Land Registry (Peterborough) [2010] EWCA Civ 200; [2011] QB 413; [2010] 3 WLR 1223; [2010] 3 All ER 113, CA
R (Warden and Fellows of Winchester College) v Hampshire County Council [2008] EWCA Civ 431; [2009] 1 WLR 138; [2008] 3 All ER 717; [2008] RTR 301, CA
Robinson Webster (Holdings) Ltd v Agombar [2002] 1 P & CR 243
Suffolk County Council v Mason [1979] AC 705; [1979] 2 WLR 571; [1979] 2 All ER 369, HL(E)
Todd v Adams and Chope (trading as Trelawney Fishing Co) [2002] EWCA Civ 509; [2002] 2 All ER (Comm) 97; [2002] 2 Lloyd's Rep 293, CA

The following additional cases were cited in argument:

Commission for New Towns v JJ Gallagher Ltd [2002] EWHC 2668 (Ch); [2003] 2 P & CR 24
Hale v Norfolk County Council [2001] Ch 717; [2001] 2 WLR 1481; [2001] RTR 397, CA
Hollins v Oldham (unreported) October 1995, Judge Howarth
Jennings v Stephens [1936] Ch 469, CA
Marriott v Secretary of State for the Environment, Transport and the Regions [2001] JPL 559
R v Inhabitants of the County of Southampton (1887) 19 QBD 590, DC
R v Oxfordshire County Council, Ex p Sunningwell Parish Council [2000] 1 AC 335; [1999] 3 WLR 160; [1999] 3 All ER 385; [1999] LGR 651, HL(E)
R v Secretary of State for the Environment, Ex p Burrows [1991] 2 QB 354; [1990] 3 WLR 1070; [1990] 3 All ER 490; 89 LGR 398, CA
R (Ridley) v Secretary of State for the Environment, Food and Rural Affairs [2009] EWHC 171 (Admin)

No additional cases were referred to in the skeleton arguments.

APPEAL from Judge McCahill QC sitting as a judge of the Chancery Division in the Bristol District Registry

By a claim form the claimants, Vera Mary Ann Fortune, Rosemary Phoebe Ayres and John Stewart Heselden, the owners of property fronting onto Rowden Lane, Chippenham, Wiltshire, brought proceedings against the defendants, Wiltshire Council and Taylor Wimpey UK Ltd, whereby they disputed the nature and extent of the public's right of way over Rowden Lane, following the grant of planning permission for a residential development comprising 138 houses adjacent to the lane, which was to be implemented by, inter alios, the second defendant. The second defendant played no active role in the action and agreed to be bound by the judgment. On 12 October 2010 Judge McCahill QC dismissed the claim.

By an appellant's notice dated 24 February 2011 and pursuant to permission granted by the Court of Appeal (Lloyd LJ), the first claimant appealed on the grounds, inter alia, that (1) the judge's reasoning and conclusions in his treatment of the evidence generally were flawed in numerous respects; (2) the judge had wrongly rejected the claimants' case that public rights of way for mechanically propelled vehicles over Rowden Lane could be extinguished because they were not immediately before the commencement of the Natural Environment and Rural Communities Act 2006 shown on the relevant definitive map and statement or were only shown as a footpath, bridleway or restricted bridleway; and (3) the judge

had erred in law in failing to hold that Rowden Lane was not shown on a qualifying list on 1 May 2006.

The facts are stated in the judgment of the court.

George Laurence QC and *Nicholas Caddick QC* (instructed by *Nicholsons Solicitors LLP, Lowestoft*) for the first claimant.

Timothy Mould QC and *Jeremy Burns* (instructed by *Head of Legal Services, Wiltshire Council, Trowbridge*) for the local authority.

The second defendant did not appear and was not represented.

The court took time for consideration.

20 March 2012. **LEWISON LJ** handed down the following judgment of the court.

Introduction

1 This is the judgment of the court.

2 In 2002, against the objection of local residents, planning permission was granted for the erection of 138 houses on land adjoining Rowden Lane in Chippenham. However it will be difficult, if not impossible, to implement the permission unless that part of Rowden Lane with which we are concerned is a public vehicular highway. The first claimant, [redacted] one of the residents, says that although it is a public highway, the public are restricted to use on foot and on horseback, and are not entitled to use it with vehicles (or at least not with mechanically propelled vehicles). Wiltshire Council says that it is a public vehicular highway. The first claimant says that even if it was a public vehicular highway before 2006, the public's right to use it with mechanically propelled vehicles has been extinguished by statute. The council says that the right remains in being.

3 The second defendant, Taylor Wimpey, one of the developers, was joined as a party to the action but has played no active role, having agreed to be bound by the decision. The dispute was tried in Bristol by Judge McCahill QC over some 12 days. In a reserved judgment of remarkable length and detail he decided all the issues in favour of the council. The full judgment is available on BAILII. With the permission of Lloyd LJ the first claimant appeals.

4 Mr George Laurence QC and Mr Nicholas Caddick QC presented the first claimant's case. Mr Timothy Mould QC and Mr Jeremy Burns presented that of the council.

5 Although Mr Laurence made serious criticisms both of the judge's findings of fact and of his legal conclusions, he acknowledged the conspicuous care with which the judge had dealt with the many points, both factual and legal, that were argued before him. We associate ourselves with that generous tribute; although as will be seen we did not find it necessary to deal with all the issues that the judge had to decide.

6 The judge began by considering whether a public vehicular highway had arisen by 20 years' use in the period between 1982 and 2002. He found that it had. He next considered whether Rowden Lane had in any event been a public vehicular highway since before 1835 (when the first of the modern Highways Acts came into force). He considered a variety of documentary evidence and concluded that it had been. His next task was to consider the

width of the highway. He held that the "hedge to hedge" presumption applied. Having reached those conclusions he then considered whether the public's right to use the highway with mechanically propelled vehicles had been extinguished by section 67 of the Natural Environment and Rural Communities Act 2006 ("NERCA"), or whether it had been preserved by one of the specific exceptions in the Act. He decided that one of the specific exceptions applied (leaving over the question whether another specific exception might also apply). We heard the issues in a different order. We began by inviting the parties to argue the case for and against dedication at common law. If the appeal failed to dislodge the judge's conclusion on that issue, then the questions of modern use and the width of the highway would not arise. At the conclusion of the argument we indicated that we had not been persuaded that the judge's conclusion was wrong. The only remaining issue was the point arising under NERCA, and we heard argument on that.

Topography

7 Mr Laurence produced a helpful annotated plan based on the current Ordnance Survey map which helps to understand the topography, and which is annexed to this judgment. The section of Rowden Lane in dispute runs south eastwards from its junction with the A4, Bath Road at Rowden Hill to a cattle grid. From its junction with the A4, for the first 70 metres, Rowden Lane appears initially as a suburban street, with pavement, kerbs and street lights. The judge referred to this westernmost section of Rowden Lane as "section A". This section of Rowden Lane stops just beyond the car park of a pub called the Rowden Arms. From about 70 metres east of the A4 until it reaches a cattle grid, Rowden Lane has a more rural character. This section of Rowden Lane consists of a metalled road, with grass verges bounded on both sides either by hedges or stone walls, beyond which lie those properties that front or back onto the lane. The judge referred to this section of Rowden Lane as "section B". It runs for about 400 metres. It is from this section of Rowden Lane that there is access to the land over which planning permission has been granted. Continuing in a south-easterly direction across the cattle grid the continuation of Rowden Lane leads towards what is now Rowden Farm. Shortly before it reaches Rowden Farm it is joined by another way coming in from the north. The junction was referred to as "point K" and is so marked on the plan. If the traveller were to turn north up that other way he or she would (nowadays) walk along a former footpath northwards in the direction of the Bath Road, which would in due course become the modern Gipsy Lane (sometimes called Gypsy Lane). Gipsy Lane debouches onto the Bath Road. Thus it would be theoretically possible to travel in a loop from the junction of Rowden Lane and the Bath Road, down to the junction of the two ways at point K, and back up again to rejoin the Bath Road at its junction with Gipsy Lane.

8 The section of the Bath road that leads from its junction with Rowden Lane to its junction with Gipsy Lane rises at a fairly steep gradient. There are also gradients if the traveller were to follow Rowden Lane down from the junction with the Bath Road and then back up Gipsy Lane. Although [redacted] made submissions about these gradients they were not explored in detail at trial. The judge had a site view; and the gradients did not seem to him to be an impediment to the council's case.

A 9 If, instead of turning north along the footpath, the traveller were to continue along Rowden Lane he would shortly arrive at Rowden. The current Ordnance Survey map shows a collection of houses, together with Rowden Manor and the site of Rowden. Earlier versions of the Ordnance Survey map also show the remains of intrenchments, a moat, and a fort.

10 The judge recorded that it was common ground that Rowden Lane
B was a public highway. The dispute between the parties was over the nature of the rights which the public could exercise over the lane, and the width of the highway over which those rights could be exercised. Until shortly before trial in November 2008, the first claimant and her fellow claimants admitted that section A was a public vehicular highway. With the judge's permission, they then changed their case to withdraw their admission in respect of section A and instead to contend that the disputed section of Rowden Lane
C (i e both sections A and B) is no more than a bridleway. Thus the first claimant accepts that the disputed section of Rowden Lane is subject to public rights of way, but asserts that those public rights of way are limited to passage on foot and on horseback. She also accepts and asserts that, at least historically, it would have been possible for public rights of passage on foot and on horseback to have been acquired over a thoroughfare (or usable
D through route) starting at the junction between Rowden Lane and the Bath Road, and ending back on the Bath Road via the junction at point K and Gipsy Lane. The concession relating to sections A and B of Rowden Lane is made because of the inclusion of section C of Rowden Lane on the definitive map where it is shown as a road used as a public path and the deeming provisions of the Highways Act 1980 and its predecessors.

E *Legal principles*

11 Lord Diplock introduced the subject in *Suffolk County Council v Mason* [1979] AC 705, 709–710:

> "The law of highways forms one of the most ancient parts of the common law. At common law highways are of three kinds according to
F the degree of restriction of the public rights of passage over them. A full highway or 'cartway' is one over which the public have rights of way (1) on foot, (2) riding on or accompanied by a beast of burden and (3) with vehicles and cattle. A 'bridleway' is a highway over which the rights of passage are cut down by the exclusion of the right of passage with vehicles and sometimes, though not invariably, the exclusion of the right of driftway, i e, driving cattle, while a footpath is one over which the
G only public right of passage is on foot. At common law too a public right of way of any of the three kinds has the characteristic that once it has come into existence it can be neither extinguished nor diminished by disuse, however long the period that has elapsed since it was last used by any member of the public—a rule of law that is the origin of the brocard 'once a highway, always a highway.' "

H 12 The public may acquire a right of way either by dedication and acceptance, or by the operation of some statutory provision. Dedication may be express, or may be inferred from use of the way by the public. In the case of ancient highways dedication by inference from public use is the most common method of establishing the existence of a highway. The classic

description of dedication by inference is that of Lord Blackburn in *Mann v Brodie* (1885) 10 App Cas 378, 386: A

> "where there has been evidence of a user by the public so long and in such a manner that the owner of the fee, whoever he was, must have been aware that the public were acting under the belief that the way had been dedicated, and has taken no steps to disabuse them of that belief, it is not conclusive evidence, but evidence on which those who have to find the fact may find that there was a dedication by the owner whoever he was." B

13 Use by the inhabitants of a locality counts as public use for this purpose: *Fairey v Southampton County Council* [1956] 2 QB 439, 457; *Oxfordshire County Council v Oxford City Council* [2004] Ch 253, para 100.

14 The presumption of dedication from use by the public is "a probable C inference from facts proved to the fact in issue, and it follows that in a particular case it is for the judges of fact to determine whether, on the evidence adduced, it can reasonably be drawn": *Folkestone Corpn v Brockman* [1914] AC 338, 354. One obvious area for evidence is the nature of the way over which the public right of way is claimed. If the way leads from one recognised highway to another, or from one inhabited settlement to another, the inference may be relatively easy to draw. If, on the other D hand the way leads nowhere, the inference may be more difficult to draw. But there is no rule of law that precludes a factual conclusion that a public highway has been established over a route that ends in a cul de sac. In *Moser v Ambleside Urban District Council* (1925) 23 LGR 533, 540 Atkin LJ said:

> "I think you can have a highway leading to a place of popular resort even though when you have got to the place of popular resort which you E wish to see you have to return on your tracks by the same highway, and you can get no further either by reason of physical obstacles or otherwise."

15 We doubt whether this is limited to a place of "popular resort" in the recreational sense. A way leading to a seaport or to a settlement at the end of a peninsula might equally be a highway. F

16 Mr Laurence submitted on the authority of *Folkestone Corpn v Brockman* that long use by the public, even if it is use of the quality usually described as use "as of right", does not necessarily result in the conclusion that there has been a common law dedication of a highway; or even that it raises a presumption of such a dedication. It is evidence from which an intention to dedicate may be inferred: no more than that. He commended a G passage from the speech of Lord Dunedin, at p 375:

> "User is evidence, and can be no more, of dedication. The expression that user raises a presumption of dedication has its origin in this, that in cases where express dedication is out of the question, no one can see into a man's mind, and therefore dedication, which can never come into being without intention, can, if it is to be proved at all, only be inferred or H presumed from extraneous facts. But that still leaves as matter for inquiry what was the user, and to what did it point. And this must be considered, not after the method of the Horatii and Curiatii, by taking a set of isolated findings, saying that they presumably lead to a certain result, and then proceeding to see if that presumption can be rebutted, but by considering

A the whole facts, the surroundings which lead to the user, and from all those facts, including the user, coming to the conclusion whether or not the user did infer dedication."

17 Lord Dunedin illustrated his point with two examples, at pp 375–376:

B "If you know nothing about a road except that you find it is used, then the origin of the road is, so to speak, to be found in the user, and in such cases it is safe to say, whether strictly accurate or not, that the user raises a legal presumption of dedication. That really means no more than this, that the evidence points all one way. Hundreds of highways are in this position. But suppose, on the other hand, you do know the origin of a road. Suppose it is the avenue to a private house, say, from the south. C But from that house there leads another avenue to the north which connects with a public road different from that from which the south avenue started. This is not a fancy case. The situation is a common one in many parts of the country. Would the mere fact that people could be found who had gone up the one avenue and down the other—perhaps without actually calling at the house—raise a presumption that the landholder had dedicated his private avenues as highways? The user D would be naturally ascribed to good nature and toleration."

18 These passages concern the question whether an inference of an intention to dedicate should be inferred as a result of long public use. If there was no relevant public use then the question of an intention to dedicate for that use does not arise. It is only if there was long public use of the relevant kind (in this case with vehicles) that the question of an intention to dedicate E is live. It is not entirely easy to see why Mr Laurence placed such heavy reliance on the quoted passages, because it is conceded that the disputed sections of Rowden Lane were part of a highway (albeit limited to use on foot and on horseback). This concession necessarily entails an intention to dedicate. What Mr Laurence has to submit is that although there was an intention to dedicate, and although use by the public included use with F vehicles, the intention was limited to use on foot and on horseback. *Folkestone Corpn v Brockman* [1914] AC 338 says nothing about that situation.

19 However, although he conceded that Rowden Lane was a highway, Mr Laurence made it clear that he was not conceding that anyone ever had any actual intention to dedicate Rowden Lane as a highway. Its status as a highway came about because of the conclusive effect of the definitive map G and the deeming provisions of the 1980 Act (and its predecessors). Under section 31 of the 1980 Act dedication may be presumed from 20 years' use. The relevant parts of that section provide:

"(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of H right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it."

"(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to

use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise." A

20 Since section 31(1) refers to a deemed dedication that must, in our judgment, entail (at least) a deemed intention to dedicate; and we consider that this is reinforced by the ability of the owner to prove a lack of intention to dedicate. Thus intention to dedicate is part of the concept of the deemed dedication. Accordingly even though Mr Laurence's concession was partly B based on the deeming provisions, in our judgment that necessarily entails an intention to dedicate. Mr Laurence did, however, accept that (a) if the highway was created by dedication and acceptance at common law and (b) if the use of the way by the public included use with vehicles as well as on foot and on horseback, then it would be unsustainable to conclude that the inferred intention to dedicate was limited to passage on foot and horseback only, to the exclusion of vehicles. C

21 There are two other points to be made about *Folkestone Corpn v Brockman*. First, the origin of the way in question was known in that case. It was laid out by the Earl of Radnor in 1827 in connection with the residential development of land of which he was life tenant. Second, the way in question ran entirely over land in the same ownership: viz that of Lord Radnor (or the trustees of the settlement of which he was life tenant). Lord D Dunedin's observations about two carriageways through a private park must be read in that context. It may be easier to infer an intention to dedicate where a way runs through land owned by several owners all of whom (at least) use it.

22 In the nature of things where an inquiry goes back over many years (or, in the case of disputed highways, centuries) direct evidence will often be impossible to find. The fact finding tribunal must draw inferences from E circumstantial evidence. The nature of the evidence that the fact finding tribunal may consider in deciding whether or not to draw an inference is almost limitless. As Pollock CB famously directed the jury in *R v Exall* (1866) 4 F & F 922, 929:

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, F for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength."

23 In addition section 32 of the 1980 Act provides:

> "A court or other tribunal, before determining whether a way has G or has not been dedicated as a highway, or the date on which such dedication, if any, took place, shall take into consideration any map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified by the circumstances, including the antiquity of the tendered document, the status of the person by whom and the purpose for H which it was made or compiled, and the custody in which it has been kept and from which it is produced."

24 At common law the inhabitants of a parish were bound to repair the highways within their area unless it could be shown that responsibility had

A attached to an individual or a corporate body by reason of tenure, inclosure or prescription. The Highway Act 1835 modified the position by providing that no road or occupation way made after 1835 was to be repairable by the inhabitants at large unless it was expressly adopted by the highway authority under the formal procedure laid down in the Act. All footpaths, whether created before or after 1835, remained the responsibility of the inhabitants B at large until December 1949, when the National Parks and Access to the Countryside Act 1949 ("NPACA") applied certain provisions of the Highway Act 1835 to public paths. After 1835 it was possible for roads to be created which did not become the liability of any person or persons to repair. Apart from such roads as these, repair of highways by inhabitants at large remained the underlying principle of the law until the enactment of the Highways Act 1959 which provided that no duty with respect to the C maintenance of highways was to lie on the inhabitants at large of any area.

25 Since the Highways Act 1959, as regards liability to repair, highways fall into three main classes: (1) highways repairable at the public expense; (2) highways repairable by private individuals or corporate bodies; and (3) highways which no one is liable to repair. See *Halsbury's Laws of England,* 4th ed (2004 reissue), vol 21, para 247.

D **26** In view of the first claimant's reliance on the way that Rowden Lane was dealt with in conveyancing documents, it is also necessary to say something about the ownership of highways. Arden LJ traversed this ground in *R (Smith) v Land Registry (Peterborough)* [2011] QB 413.

27 Before the Highway Act 1835 the property in a highway belonged to the frontagers, even though it was repairable by the inhabitants at large. Section 41 of the Highway Act 1835 provided that the "scrapings" of a E highway should vest in the parish surveyor of highways or, where a district surveyor had been appointed, in the district surveyor. By section 149 of the Public Health Act 1875 streets in urban districts which were repairable by the inhabitants at large, were vested in the urban authority for that district. Chippenham was an urban district. Urban district authorities also took on the previous repairing duties of the highway surveyors. Similar provisions F relating to rural districts were made by the Local Government Act 1894. The Local Government Act 1929 made county councils highway authorities for main roads within their areas, and vested the "materials thereof and drains thereto belonging" in them. It was not until the Highways Act 1959 that there was a clear statutory provision that vested highways themselves (as opposed to the scrapings and materials of highways) in the relevant highway authority. That is carried forward into G the current legislation: 1980 Act, section 263(1). The point is that before 1836 it would not be surprising for conveyances to deal with the soil of a highway; and even after 1835 it was only the scrapings or materials of the highway that vested in the surveyor. The modern position under which the "top two spits" of a highway is vested in the highway authority did not come about until much later.

H

Approach to appeals on fact

28 The judge's conclusions which are challenged are essentially questions of fact. His ultimate conclusion came after examining a number of different strands of evidence: what is sometimes called a multi-factorial

evaluation. In *Todd v Adams and Chope (trading as Trelawney Fishing Co)* [2002] 2 All ER (Comm) 97, para 129 Mance LJ said:

> "Once the appellant has shown a real prospect (justifying permission to appeal) that a finding or inference is wrong, the role of an appellate court is to determine whether or not this is so, giving full weight of course to the advantages enjoyed by any judge of first instance who has heard oral evidence. In the present case, therefore, I consider that (a) it is for us if necessary to make up our own mind about the correctness or otherwise of any findings of primary fact or inferences from primary fact that the judge made or drew and the claimants challenge, while (b) reminding ourselves that, so far as the appeal raises issues of judgment on unchallenged primary findings and inferences, this court ought not to interfere unless it is satisfied that the judge's conclusion lay outside the bounds within which reasonable disagreement is possible. In relation to (a) we must, as stated, bear in mind the important and well-recognised reluctance of this court to interfere with a trial judge on any finding of primary fact based on the credibility or reliability of oral evidence."

29 In *Assicurazioni Generali SpA v Arab Insurance Group (Practice Note)* [2003] 1 WLR 577 this court approved that approach; and it was again approved by the House of Lords in *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] 1 WLR 1325.

30 That said, it is not the function of this court to retry the case. Our function is to decide whether the appeal should be allowed on the ground that the judge was wrong: CPR r 52.11(3)(a). It is for the first claimant to persuade us that he was wrong, either in his findings of fact or in his application of the law.

The case for the council at trial

31 The case for the council was based largely on the expert evidence of [redacted] He considered a variety of materials. They included local histories, old maps, local authority records and so on. He summarised his conclusions at the end of his first report in a section headed "Synopsis". He said:

> "In my opinion Rowden Lane is an ancient vehicular public highway, in existence before its first known map recording in 1669. The vehicles involved in such use could have included carts, wagons, sledges and more latterly carriages. The main purpose of the historical public use would appear to have included access to the open common lands surrounding Rowden Lane prior to the inclosure of these lands. In addition it is also quite probable that Rowden Lane was used as access to the place known as Rowden; and also as an alternative use to the Great (London) Road so as to avoid its poor condition and possibly later to avoid the paying of tolls on the section of the main road it bypasses."

32 There were thus three distinct types of public use on which [redacted] relied. The first two did not entail the use of Rowden Lane as part of a vehicular through route which joined the London (or Bath) Road at each end. The third type did. Although Mr Laurence said in the course of his reply in this court that he had not understood what the council's case was, in our judgment this synopsis made it perfectly clear.

A 33 The case for the first claimant was based largely on the expert evidence of Professor Williamson. His conclusion was that the disputed section of Rowden Lane was formally created in about 1669 as a private access road and that it continued to be regarded as such well into the 20th century. Although a public bridleway might have existed along it (or part of it), Rowden Lane was never a full public highway open to vehicles. It was very unlikely that Rowden Lane formed part of a through route enabling a B traveller with a vehicle to bypass the London Road. There would have been no advantage to be gained, and the through route would have required the navigation round a very difficult V shaped junction unsuitable for wheeled traffic where Rowden Lane met Gipsy Lane.

34 The judge began his consideration by discussing modern use of Rowden Lane. However, as mentioned we began by looking at the C historical material on which the judge also relied. The judge preferred the evidence of [redacted] to that of Professor [redacted] where they were in conflict. He gave reasons for this conclusion running to some 20 paragraphs of his judgment. Put bluntly, he considered that Professor [redacted] was more of an advocate than an independent expert. Mr Laurence criticised the judge for having preferred the evidence of [redacted] to that of Professor Williamson. He pointed to a number of errors that he said [redacted] D had made. However, in his evaluation of the expert evidence the judge gave weight to these errors, which he acknowledged, but explained why nevertheless he preferred [redacted] evidence. The evaluation of expert evidence subjected to lengthy cross-examination (of which we have only had extracts) is pre-eminently a matter for the trial judge. We decline to interfere with or discount the judge's evaluation of the expert evidence. E Having said that, where the judge's reasoning depended on documents that can be interpreted without the aid of expert evidence we have formed our own view.

Two questions

35 Before delving into this fascinating material, there are two F fundamental questions that in our judgment the first claimant's case does not adequately deal with. She accepts that Rowden Lane is a public highway. It follows therefore that at some time in the past it must have been dedicated as a highway (no doubt inferred by long public use). However, the first claimant says that the public rights of way are limited to use on foot or with animals. The first question is: if it is accepted that the public used the way as of right, where were they going to? The answer must be either that they were G using Rowden Lane as part of a network of highways (i e as a thoroughfare) or they were visiting some particular place simply as members of the public. Indeed the judge recorded that Professor Williamson accepted that there must have been a public attraction or attractions at the end of section B of Rowden Lane to attract the public along it (para 945), and the judge so found. The judge's finding was well supported by the evidence to which we were referred.

H 36 Much of the skeleton argument for the first claimant is devoted to attempting to demonstrate that the public had no reason for using Rowden Lane. But that argument is inconsistent with the first claimant's acceptance that Rowden Lane was (and still is) indeed a highway. The concession and assertion that Rowden Lane was and still is a highway also seems to us to

deal with the point that Lord Dunedin made in *Folkestone Corpn v Brockman* [1914] AC 338. If there was public use "as of right" then it is effectively conceded that an intention to dedicate should be inferred. It would make no sense to conclude that while the landowner intended to dedicate the way as a highway for foot traffic and riders, use by carters was use by mere toleration. So the real question is: was there sufficient evidence upon which the judge could conclude that there was public use of the way with vehicles?

37 The second question is: given the width and nature of Rowden Lane from the earliest recorded times, how does it come about that there has been a dedication for use by pedestrians and riders but not for horses and carts? The latter question was posed by the judge (paras 673 and 942); but neither the grounds of appeal nor the skeleton argument really provide an answer.

The early maps and other material

38 The judge began his consideration of this material with a short history of Rowden. Rowden lies on what was formerly a down. Its old name was Rughdon, probably meaning rough down. It was already a place in occupation in 1190. The principal residence of the area was a mansion house or manor, now Rowden Farm, close to the River Avon. Rowden Manor was also the site of an ancient fort.

39 In 1434, it passed to the Hungerford family who, ten years before, had purchased Sheldon and the Manor and Hundred of Chippenham. In 1554, Queen Mary granted a charter to the borough of Chippenham. She also gave it certain lands which she had confiscated from Walter Lord Hungerford, who had called King Henry VIII an heretic. Lord Hungerford was executed at Tower Hill. His manors of Chippenham, Sheldon and Lowden, together with a very considerable number of other Wiltshire manors elsewhere, were forfeited and remained in the Crown until the next heir, then a minor, reached the age of 21.

40 Some 23 days before the heir of Lord Hungerford came of age, Queen Mary gave about 66 acres of Lord Hungerford's land to the borough. These lands included the Great Coppice. The judge said of the Great Coppice that it lay over an area of 17 acres and (para 610) that there was "a general right for the inhabitant householders of Chippenham to coppice wood from it. It was harvested every seven years for quantities of poles needed to make sheep hurdles (fencing)". This finding was based on the work of [redacted] a local historian, writing in 1980. It is not now disputed. It was accepted that the inhabitants of Chippenham were not exercising the right to take wood in their capacity as commoners; and that the inhabitants of Chippenham constituted the public for the purposes of the law of highways.

41 In addition to [redacted] work the judge also considered [redacted] Goldney's Records of Chippenham (1889). That work referred to a record from 1647 by which the coppice was allotted to the inhabitant householders of Chippenham "according to decree". [redacted] also recorded complaints in 1649 that the right to take wood from the coppice was being abused by "diverse unrulye and disorderlie people not onelie of this town and pishe but alsoe of other pishes adjoyneing hereunto". The judge drew two important inferences from this material.

A First that access to the Great Coppice was down Rowden Lane (para 611); and second that the removal of wood would have required a horse and cart (i e use by vehicles): para 613.

42 The judge was helped in his reconstruction of the landscape as it was in the 16th century by a plan prepared in 1905. This plan was the work of [redacted] who explained in an accompanying memorandum that it had been prepared from borough records and "other authoritative B local maps and plans". He said that the plan had been "prepared at first hand from the original official records of the borough (which comprise very many deeds, documents, [maps], plans and minute—and other books) and from other local [maps] and plans already mentioned." This plan showed clearly a spur road leading off Rowden Lane to the Great Coppice. It also showed a cart track more or less in the position of Gipsy Lane joining C Rowden Lane at about point K. Mr Laurence said that this plan was obviously inaccurate and that the judge should have ignored it. We reject that submission. The maker of the plan said that it had been compiled from a variety of original sources; and there is no reason to doubt that assertion. It is true that the depiction of the spur road does not appear on some later plans. But that is a question of weighing all the evidence. It is not a question of ignoring some of it. D

43 By the 17th century Rowden Manor was a large property with a quadrangle inside and a moat around it. The Hungerfords were Parliamentarians and the Royalists seized and sacked it.

44 The earliest contemporaneous map that the judge considered was an inclosure map dating from 1669. He set out the rival contentions of [redacted] and Professor [redacted] paras 620–632. The 1669 map E depicted Rowden Lane as "Rowden Way". One of the points of disagreement between the experts was whether (as Professor [redacted] contended) the 1669 inclosure agreement *created* Rowden Way in substitution for old tracks across the common, or whether (as [redacted] contended) it *recognised* a pre-existing way. The judge concluded that Rowden Way existed well before 1669, because it already had its own name, and it led to a named destination. Rowden was a place of interest, F and therefore the public had a reason to, and did, visit it: para 633. The judge also noted that Rowden Lane (and gates across the way) was wide enough to take horses and carts, and that Rowden Lane came off a main road (now the A4).

45 Mr Laurence said that the judge had ignored the evidence of this map in coming to his conclusions that the public had used Rowden Lane to G gain access to the Great Coppice. His point was that the solid lines on the map represented impassable boundary features and no gates were shown in the boundary adjoining the Great Coppice. He pointed to some evidence given by Professor Williamson in which he interpreted solid lines as boundary features. The judge did not refer to this evidence expressly. But he must have rejected it. It is not difficult to see why. If Professor Williamson's interpretation of the solid lines were correct, then no allottee of land (with H the possible exception of one) would have been able to access his land, since all the allotted parts were bounded by solid lines on the map. Second, as Mr Laurence accepted, the only alternative means of access to the Great Coppice would have been along the Lacock road. But in the first place that would have necessitated crossing a stream in order to access the coppice.

So there was a natural physical barrier to that means of access. Mr Laurence suggested that there might have been a bridge over the stream; but there was no evidence at all to support that. In the second place anyone coming from Chippenham to the Great Coppice would have reached the junction of Rowden Lane and the Bath Road well before the Lacock Road; and it would have been natural to have taken the first turning off the main road. In our judgment the judge was fully justified in concluding that Rowden Lane was used as a means of vehicular access to and egress from the Great Coppice, as well as to gain access to the place called Rowden.

46 This was a very important finding. What it meant was that the origin of the way was very old and, moreover, was unknown. To revert to the passage from Lord Dunedin's speech in *Folkestone Corpn v Brockman* [1914] AC 338, 375 that Mr Laurence commended:

> "If you know nothing about a road except that you find it is used, then the origin of the road is, so to speak, to be found in the user, and in such cases it is safe to say, whether strictly accurate or not, that the user raises a legal presumption of dedication. That really means no more than this, that the evidence points all one way."

47 The next map that the judge found to be of assistance was Andrews and Dury's Map of Wiltshire, produced in 1773. This was a commercially produced map. The judge said that this map did not show footpaths, but only vehicular routes: para 655. This finding accorded with the evidence of Professor Williamson who accepted that by and large Andrews and Dury basically showed vehicular ways, although there might have been one or two bridleways. The judge found that this map showed Rowden Lane as part of a thoroughfare, which Professor Williamson also accepted in cross-examination; although he did to some extent retract that concession in re-examination. The judge said of this map that "it was the first map of the county to be based on a meticulous original survey, and that it is considered by experts to be of very fine quality. It was described, in a catalogue of Wiltshire maps, as one of "the finest maps of Wiltshire before the Ordnance Survey". The map shows Rowden Lane, Gipsy Lane and the intervening track across the field to be of a fairly uniform width. According to the judge

> "this map demonstrated that it is more likely than not that in 1773 there was a clearly visible and established thoroughfare between the Bath Road, Gipsy Lane, across the fields to connect with Rowden Lane and back onto the Bath Road": para 650.

Although he accepted that the map did not prove the public status of the topography that it recorded, he inferred that the map showed the ways to be "of some local significance, and more than just private tracks": para 651.

48 It is also worth noting that on the Andrews and Dury map the junction between Rowden Lane and Gipsy Lane is shown as a right angle (i e not an acute "V" shape). Other junctions depicted on this map illustrate different angles of junction between roads. Mr Laurence said that this feature should be ignored because Andrews and Dury was only a schematic map. However, both experts praised its quality. The depiction of the junction is a piece of evidence that the judge was entitled to take into account. There is no warrant for ignoring it completely. Even if the Andrews and Dury map did not plot the angle of junction accurately, the

A point remains that it still showed a vehicular through route. Moreover, if the Andrews and Dury map was merely schematic as Mr Laurence suggested, the angle shown on that map may have represented a "swept curve" at point K about which there was so much debate both at trial and before us. In addition the Andrews and Dury map also showed a spur road leaving Rowden Lane shortly before its junction with Gipsy Lane. This feature is inconsistent with the contention that Rowden Lane was no more than a private track serving Rowden Farm.

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49 The judge then considered a map of 1784 made by Mr Powell, a land surveyor. Again he set out the rival views of [redacted] and Professor [redacted] His own impression from the map was that Rowden Lane and Gipsy Lane were roads of some importance. They were hedged on both sides, had worn or used surfaces and seemed to be important parts of the local public road network, at para 675. Even if Rowden Lane was not a thoroughfare he would still have regarded Rowden Lane as part of the local public road network. It was shown on the map as wider than footpaths; and pecked lines on the map showed a used or surfaced part of the road with verges on each side. This would have accorded with Professor Williamson's concession that there must have been one or more attractions at the end of Rowden Lane so as to attract the public to go there at all, at para 945, and with the judge's previous finding that Rowden Lane was used both as access to the Great Coppice and to the place called Rowden. But in fact the judge said that he was persuaded by [redacted] that Rowden Lane was part of a thoroughfare, at para 678.

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50 There are number of other features of this map worthy of mention. Footpaths were clearly marked as such on the map, but Rowden Lane carried no such notation. The map also distinguished in terms of nomenclature between "Rowden Down Lane" (which corresponds with sections A and B of the modern Rowden Lane) and "Rowden Farm Lane" which runs from a pond adjoining one of the footpaths to Rowden Farm. The very fact that the two parts of the way are given different names (and that only one of them is linguistically tied to Rowden Farm) suggests that Rowden Down Lane was more than a mere private access to Rowden Farm. At the eastern end of Rowden Down Lane Rowden Down Lane meets a field called Home Down (at a point which corresponds with the modern cattle grid). A way continues across Home Down represented by pecked lines on the map. But there is also a spur depicted in the same way as Rowden Down Lane itself, which turns at right angles to Rowden Down Lane (i e to the south). This spur does not form part of the access to Rowden Farm: it must be going somewhere else. This feature of the map also undermines Mr Laurence's submission that Rowden Down Lane was no more than a private access to Rowden Farm. At the beginning of Rowden Farm Lane (its western end) the way widens out adjacent to the pond. This may well represent a place where animals were allowed to drink.

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51 The judge found corroboration for the thoroughfare theory in two other maps he examined: Archibald Robertson's map of 1792, and the first Ordnance Survey map of 1828. Both these maps showed a "clearly demonstrated through route from the Bath Road (A4), along Gypsy Lane, across fields and back along Rowden Lane to the A4" of sufficient importance to be shown on the map: paras 681, 689. In the course of his cross-examination Professor Williamson agreed that Robinson's map

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showed Rowden Lane as part of a through route for vehicles. Robinson's map also showed the junction between Rowden Lane and Gipsy Lane as a rectangular bulge which might well have accommodated turning vehicles. Professor Williamson had no alternative explanation. Professor Williamson also agreed that the Ordnance Survey map showed a vehicular through route; but added the qualification that he was not accepting that it had any particular legal status.

52 The next plan that the judge examined was a plan of property belonging to a [redacted] It dated from 1796. It depicted the main road, described as "the Turnpike Road from London to Bath", and "Rowden Lane". It also shows another spur road coming off Rowden Lane in addition to that shown on Mr Powell's map of 1784. This spur corresponds with the spur shown on the plan prepared by Mr Perkins in 1905. This map also shows gates (including field gates). The spur in question appears from this map to have been fenced or hedged. It was uncoloured on the map. The significance of this plan, in the judge's view lay principally in its colouring. The Bath road was coloured brown on the plan as was Rowden Lane. Not all the roads shown on that plan were coloured; and the judge drew the inference that the brown colouring was intended to say something about the status of the coloured roads: namely, that they were public roads.

53 The first Ordnance Survey map was produced in 1828. It showed the spur road that had been depicted on the 1796 plan, and showed it as fenced or hedged. It also showed the angle between Rowden Lane and Gipsy Lane as a less acute angle than the "V" shape that Professor Williamson spoke to.

54 The judge moved on to consider Greenwood's map of Wiltshire, produced in 1829. Greenwood was a well known commercial map-maker who produced maps of many English counties. The judge considered that this map also showed a thoroughfare which included Rowden Lane. Professor Williamson agreed. It was not coloured in the same way as the Bath road; but nor were a multitude of other roads linking disparate settlements. The legend of the map showed that the colouring of the Bath Road meant that it was a turnpike or toll road, whereas that of Rowden Lane meant that it was a "cross road". As the judge pointed out, in 1829 the expression "cross road" did not have its modern meaning of a point at which two roads cross. Rather in "old maps and documents, a "cross road" included a highway running between, and joining other, regional centres". Indeed that is the first meaning given to the expression in the Oxford English Dictionary ("A road crossing another, or running across between two main roads; a byroad"). Professor Williamson agreed in cross-examination that a "cross road" was a reference to a road forming part of a thoroughfare. The judge gave a further explanation of the significance of the expression later in his judgment, at para 733, by reference to the *Planning Inspectorate, Rights of Way Section, Advice Note No 4, Advice on the Definition of a Cross Road* (July 1999), para 2:

> "In modern usage, the term 'cross road' and 'crossroads' are generally taken to mean the point where two roads cross. However, old maps and documents may attach a different meaning to the term 'cross road'. These include a highway running between, and joining, other highways, a byway and a road that joined other regional centres. Inspectors will,

A therefore, need to take account that the meaning of the term may vary depending on a road pattern/markings in each map."

55 The guidance went on, at para 8, to urge caution as the judge recognised, at para 734:

"In considering evidence it should be borne in mind that the recording of a way as a cross road on a map or other document may not be proof B that the way was a public highway, or enjoyed a particular status at the time. It may only be an indication of what the author believed (or, where the contents had been copied from elsewhere—as sometimes happened—that he accepted what the previous author believed). In considering such a document due regard will not only need to be given to what is recorded, but also the reliability of the document, taking full account of the totality C of the available evidence in reaching a decision."

56 The judge concluded that Greenwood's map supported "the emerging picture" of an established thoroughfare. In our judgment the label "cross road" added further support. This map also shows the angle between Rowden Lane and Gipsy Lane as a less acute angle than the "V" shape that Professor Williamson spoke to.

D 57 The next map that the judge considered in detail was the first piece of evidence that post-dated the Highway Act 1835 which marked the beginning of the modern law of highways. This was the Chippenham and Allington Tithe Award 1848. On this map Rowden Lane was coloured sienna (as were all public roads). On the other hand Rowden Lane (or at least sections A and B) was given parcel numbers, which other public roads were not. The names of the owners and occupiers of both parcels were E given. The description of these parcels was "Part of the Road to Rowden Farm" and no titheable value was attributed to it. Nevertheless the experts agreed that the tithe award plan could show either that Rowden Lane was considered to be public highway, or that it was a private road with no titheable value. The judge considered the rival arguments. He concluded that the 1848 map provided support for the proposition that sections A and F B of Rowden Lane were public carriageways. He gave weight to the fact that it was common ground that Rowden Lane was a public highway of some sort. He placed most weight on the colouring on the map which was consistent with the treatment of Rowden Lane in other maps. For example a map of 1867 produced for the purpose of a proposed change to the borough boundary showed Rowden Lane coloured in the same way as all public carriageways.

G 58 Mr Laurence's attack on the judge's conclusion is twofold. First he says that the tithe map says nothing about the status of Rowden Lane. It could have been a private road rather than a public one. The first difficulty with this submission is that it overlooks (as do so many of Mr Laurence's submissions) the admitted fact that Rowden Lane *was* a highway. Second, the judge acknowledged that the mere fact that Rowden Lane was not tithed H did not of itself show that it was a public carriageway. He drew the inference from other indications. Third, in drawing his conclusion the judge was entitled to look (as he did) at the totality of the evidence. He was not required to consider the tithe map in isolation.

59 The second main prong of the attack is that on the tithe map section C is shown as titheable, subject to a deduction. It follows from this,

says Mr Laurence, that section C cannot have been subject to public rights of way with vehicles. If section C was not subject to public rights of way with vehicles, then it follows that sections A and B of Rowden Lane must have ended in a cul-de-sac at the cattle grid separating section B from section C. It is obvious, says Mr Laurence, that a public vehicular right of way would not have ended in a cul de sac. We do not accept that this is a valid criticism of the judge. First, in the light of the judge's finding that Rowden Lane had been used by the inhabitants of Chippenham for retrieving wood from the Great Coppice and to have access to the place called Rowden, and Professor Williamson's concession that there was some attraction at the end of Rowden Lane such as to attract public use it is not obvious that Rowden Lane would not have ended in a cul de sac. Second, there is no legal impediment to the presumed dedication of a public vehicular way ending in a cul de sac. Third, the judge had in fact found that Rowden Way was part of a thoroughfare as shown by earlier maps (as Professor Williamson had accepted); and once public vehicular rights had been established over Rowden Lane they would not have ceased to be exercisable merely because part of the thoroughfare fell into disuse or became blocked.

60 The judge considered two further commercial maps: Edward Weller's map of 1862 and Bacon's map of 1876. Both these maps showed Rowden Lane as part of a through route. Bacon's map also showed some farm tracks or accommodation roads; but where these were depicted they did not join with other roads. That said, the judge did not place special reliance on either of these maps, except as part of a general picture.

61 The judge turned to consider the Ordnance Survey map of 1886. This showed Rowden Lane bounded by solid lines (which suggested solid boundary features such as hedges or walls). The width of the road was consistent with other maps. By now the pub had been built to the north of section A of the road, which provided its only access. The judge accepted the significance of the fact that Rowden Lane had its own parcel number and survey area which was one of the conventions used by the Ordnance Survey for public roads. He was satisfied that it was a proper inference that by the time of this map Rowden Lane had been dedicated and accepted as a public highway and that the public rights of passage included passage with vehicles: para 732. The 1900 edition of the Ordnance Survey map showed much the same thing. However on this map section B of Rowden Lane was shown bounded by a thicker line. By contrast section C of Rowden Lane (beyond the cattle grid) was not shown with these lines. The judge set out the rival views of the experts. [redacted]aid (and the judge accepted) that the thickness of the lines bounding section B were of the same thickness as those bounding the Bath road. [redacted]elying on part of a paper by Dr Yolande Hodson (who is an acknowledged expert on Ordnance Survey maps) said that this denoted that section B of Rowden Lane was a public road. Professor [redacted]disagreed; but accepted that the thickness of the lines showed that this section of Rowden Lane (but not section C) was capable of accepting fast wheeled traffic in all seasons. The judge accepted that the condition of the road was not definitive of its legal status (as [redacted] had indeed said in her paper), but held that this map showed that section B of Rowden Lane had a status and role higher than a private drive or road: para 744.

62 Later in his judgment the judge drew another inference from this map. He said (para 914):

> "The shading on the 1900 OS map is also a reliable indicator that sections A and B were well maintained roads suitable for taking fast wheeled traffic in all seasons. This must be contrasted with the different and inferior way in which section C was depicted. In my judgment, the way in which sections A and B had been maintained make it unlikely that they simply formed a private road to Rowden Farm, for, if that were so, one might have expected a similar level of maintenance along section C, and that is not the case. I find that the level of maintenance of sections A and B is higher than one would have expected of mere farm tracks in private ownership, and this is most confidently displayed in the 1900 OS map."

63 He concluded that the most likely explanation for the enhanced level of maintenance was that it was maintained at public expense and to a standard consistent with a pubic vehicular highway. He also pointed out that this level of maintenance would have been unjustified if sections A and B of Rowden Lane were simply a bridleway: para 915. This is not a conclusion that the judge reached simply relying on the shading: it is a conclusion he reached on a consideration of the shading in its wider context.

64 On 1 September 1896 the Chippenham Borough Council resolved to grant a lease of land adjoining Rowden Lane for use as a hospital. The grant was to include a right of way "thereto from Rowden Lane". The hospital building was very small (only 10 feet long and 15 feet wide). The buildings were, however, built, because they show up on later versions of the Ordnance Survey map. It is inconceivable that vehicles were not used in connection with the hospital. It is also probable that the reason why the granted right was to stop at Rowden Lane was that Rowden Lane was (or was reputed to be) a vehicular highway.

65 The next map that the judge considered was the map prepared for the purposes of the Finance (1909–10) Act 1910. The judge described the background to this Act by reference to paras 46 and 47 of the judgment of Etherton J in *Robinson Webster (Holdings) Ltd v Agombar* [2002] 1 P & CR 243. As it happens [redacted] gave evidence in that case too; and Etherton J accepted his evidence about the background to the Act. In fact [redacted] reproduced his description of the background in his report in the present case. There can be no possible criticism of the judge for accepting [redacted] evidence.

66 The 1910 Act was part of the embodiment of Lloyd George's "People's Budget" 1909 which followed the resolution of the constitutional crisis of 1909–1910. Among other things it imposed a new tax on land called increment value duty. This was to be levied on the increase in the value of land between its initial valuation and its subsequent sale or transfer, or on the death of the owner. It was an early form of capital gains tax. In order to establish baseline valuations, the 1910 Act provided for a valuation to be made of all the land in the United Kingdom as at 30 April 1909; an exercise described as the "New Domesday" survey. The survey was carried out by the Valuation Office of the Board of Inland Revenue. England and Wales were divided into valuation divisions, which were subdivided into

valuation districts. Within each valuation district, a number of income tax parishes were created: these were the basic units for the Valuation Office survey. A land valuation officer was appointed to each income tax parish. They were almost always the existing assessors of income tax and some 7,000 were appointed nationally. This enabled the Inland Revenue to have local people with local knowledge undertaking the crucial task of identifying hereditaments. The Act contained specific provision for reducing the gross value of land to take account of any public rights of way or public rights of use as well as easements. Valuers would have been extremely reluctant to show any land as a public road if it could be assessed for duty, and landowners were subject to criminal penalties if they falsely claimed a way to be public to minimise tax liability.

67 Mr Laurence criticised the judge for having said (in common with Etherton J) that valuers would have been reluctant to show land as a public road if it could be assessed for duty; but that was [redacted]evidence. Professor Williamson did not offer a contrary opinion. Mr Laurence also said that the judge was wrong to rely on what Etherton J had said about the importance of the Finance Act 1910 map. But the judge said that he would carry out his own independent assessment of what the map showed (para 757): and that is precisely what he did. Despite Mr Laurence's submissions we reject the assertion that the judge relied on *Robinson Webster (Holdings) Ltd v Agombar* [2002] 1 P & CR 243 for anything other than the general background.

68 Professor Williamson produced some written material which gave some more details about the background to the 1910 Act and the interpretation of maps and other materials produced in the course of carrying its provisions into effect. Section 11 of the Planning Inspectorate Consistency Guidelines (2nd revision June 2008) says, at para 11.7:

> "The 1910 Act required all land to be valued, but routes shown on the base plans which correspond to known public highways, usually vehicular, are not normally shown as included in the hereditaments, i e they will be shown uncoloured and unnumbered . . . So if a route in dispute is external to any numbered hereditament, there is a strong possibility that it was considered a public highway, normally but not necessarily vehicular, since footpaths and bridleways were usually dealt with by deductions recorded in the forms and Field Books; however there may be other reasons to explain its exclusion."

69 Professor Williamson also produced an article in Rights of Way Law Review May 2002 *(Uncoloured Roads on 1910 Finance Act maps*) in which Mr David Braham QC writes, in section 9.3, p 153:

> "In areas where the valuation work was completed, all the omitted roads were either stretches of road which ran between inclosures 'fenced roads', or roads in built-up areas. The valuations and deductions required by the Act were duly made where an unfenced stretch of highway crossed a larger area which had to be valued anyway. In such cases the larger area, such as a field or private park, was valued and a deduction was made in respect of the public right of way: that was so even if other stretches of the same highway were fenced roads which were omitted from the valuation."

70 Mr Braham also writes in the same article, on p 157:

> "The fact that the road is uncoloured may point strongly to the conclusion that the road was recognised as a highway at the time but, viewed in isolation, the fact that the road is uncoloured leaves open the question whether it was recognised as a public carriage road or as a lesser highway."

71 The consensus of opinion, therefore, is that the fact that a road is uncoloured on a Finance Act map raises a strong possibility or points strongly towards the conclusion that the road in question was viewed as a public highway. The Planning Inspectorate Consistency Guidelines suggest that such a highway was *normally* a vehicular highway, although [redacted] warns that *if viewed in isolation*, the lack of colouring leaves open the question whether the highway in question was no more than a bridleway. In addition, different treatment was given to fenced and unfenced highways.

72 The base map used for the Finance Act Map was the 2nd Edition Ordnance Survey Map 1900. The judge said (para 761) that only all purpose (vehicular) highways were excluded from tax assessment. Minor highways, including footpaths and bridleways were declared as part of the assessment, but the land showed a deduction in taxable value for any incumbrances. The position is a little more nuanced than the judge described, as the quoted documents show.

73 As [redacted] pointed out the Finance Act Map showed that land on both sides of most of the disputed section of Rowden Lane was owned by [redacted] In fact the soil of the lane had been expressly conveyed to him some years before, so there was no possible doubt about who owned the vast majority of the disputed section of Rowden Lane. The disputed part of Rowden Lane itself (up to what is now the cattle grid) is shown on the Finance Act Map as uncoloured; and it does not form part of any taxable hereditament.

74 One of the pieces of evidence before the judge in relation to the 1910 map was the treatment of Brigadier Palmer who owned land which included section C of Rowden Lane and much more besides. He claimed (and was given) a deduction of £125 from the assessed value of his land. There was debate at trial about what the deduction represented. The judge was under the impression that the first claimant had accepted that the deduction was claimed in relation to some form of public rights over section C of Rowden Lane. Mr Laurence says that the first claimant accepted no such thing. However, we come back again to the point that it is accepted that there were in fact public rights over section C of Rowden Lane. So whether or not Brigadier Palmer did *in fact* claim the deduction on account of public rights over section C, even on the first claimant's case he would have been *entitled* to make that claim. That being so, we cannot see how the judge can be said to have been wrong to infer that Brigadier Palmer exercised his entitlement to that extent. It is, however, the case that Brigadier Palmer did not claim a deduction for a full vehicular highway across his land. The judge commented that vehicular use of Gipsy Lane had probably ceased by 1910 because of improvements to the Bath Road and the absence of tolls. He said that the treatment of Brigadier Palmer's land suggested that section C of Rowden Lane had lost its reputation as a

vehicular highway. In our judgment that was a legitimate inference for him to have drawn. A

75 The judge noted that the Finance Act Map showed not only the pub with its access from Rowden Lane but also a football ground at Home Down. It, too, was accessible from section B of Rowden Lane. The judge drew the inference that the public visiting the football ground or the pub would have come and gone not only on foot or on horseback, but also in vehicles. The voluminous grounds of appeal and skeleton argument do not challenge this inference. In his oral submissions Mr Laurence criticised the judge for having drawn this inference, submitting that the public could as easily have come by vehicle from Gipsy Lane to the north east of the football ground. Maybe they could have: but why could they not have come from both directions? Which route they used might well depend on where they were coming from. This does not seem to us to be a reason that fatally undermines the judge's inference. Moreover the judge found that by 1910 vehicular use of Gipsy Lane had fallen into disuse; and Mr Laurence did not challenge this finding. The judge also noted that sections A and B of Rowden Lane were uncoloured (and untaxed) on the map. Section C of Rowden Lane, by contrast, was taxed but was subject to a deduction. [redacted] view was that this was strong evidence that sections A and B of Rowden Lane were subject to full rights of public passage (i e it was a public carriageway). It may be noted here that section C was unfenced; and hence might have been mapped differently for that reason. B C D

76 Professor Williamson agreed that the map tended to show that sections A and B of Rowden Lane were considered by the valuers to be a public carriageway. However, he put forward three principal reasons why the judge should not draw that conclusion: para 749. The first was predicated on uncertainty of ownership of Rowden Lane. But it is clear that the relevant sections of Rowden Lane were owned by [redacted] The second related to the treatment of a different footpath some distance away from Rowden Lane. This was shown on the map as partly uncoloured and partly coloured. The judge observed that the history of that other footpath had not been investigated in the evidence before him; and declined to draw any inference about why it had been treated in that way on the map. In fact it may well be the case that the footpath in question was partly fenced and partly unfenced, which may provide the explanation for its differential treatment on the map. But like the judge we decline to draw any inference from that treatment for essentially the same reason. The third reason was based on the evidence of private conveyancing, to which we will return. E F G

77 The judge considered Professor Williamson's points and concluded, at para 753:

> "I am satisfied that it is more likely than not that, if sections A and B with their wide verges, were merely a bridleway, this would have resulted in a liability to taxation, but a deduction in respect of the minor highway. In my judgment, the probable explanation for sections A and B being untaxed is because they were regarded as a full vehicular highway." H

78 The judge's conclusion echoes what is said in the Planning Inspectorate Consistency Guidelines, in the passage we have quoted. But the judge did not treat the Finance Act Map as definitive. It was simply one

A piece of the jigsaw puzzle. He considered that this conclusion was consistent with all the evidence of earlier maps. As he put it, at para 771:

> "I have elsewhere in this judgment developed the point that the majority of maps show Rowden Lane ungated at its junction with the Bath Road, and that there was no physical obstruction to passage between sections A and B. There were many and varied types of members
B of the public who used Rowden Lane over the centuries. The lane must have led to a place of public interest or purpose, because it is conceded by the claimants to be a public highway albeit only on foot and on horseback. Moreover, there is a clear picture of Gipsy Lane and Rowden Lane forming a thoroughfare leading from and to the Bath Road. Rowden Lane has been shown on many maps to be of comparable status
C to the Bath Road, and the quality of its maintained surface, revealed by the OS maps, is consistent with being used as a vehicular highway. Its width is greater than one would have expected for a footpath or bridlepath. These factors, which have been shown on the plan and maps starting in 1669, are entirely consistent with the picture presented by the 1910 map namely that sections A and B of Rowden Lane constitute a public vehicular highway."

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79 In other words the judge adopted the caution urged by [redacted] and did not consider the Finance Act Map in isolation. The main focus of attack on the judge's conclusions drawn from this map is again founded on the proposition that a vehicular right of way would not have ended in a cul de sac. We have already explained why this attack on the judge's inferences drawn from the tithe map does not show that the judge was wrong. But in
E the case of the 1910 map there is an additional factor which supports the judge's conclusion, namely the existence of the football ground and the inference that he drew that people must have come and gone to and from the football ground in vehicles. We note also that the hospital also features on the Finance Act Map where it is (uncoloured) allotment 1304. It would have been uncoloured because it was occupied by a local authority.

80 [redacted] submitted, correctly in our judgment, that the treatment
F of the disputed section of Rowden Lane on the Finance Act Map shows very clearly that it was regarded at that time as a highway. For it to have been so regarded it must necessarily have been dedicated as a highway at some time earlier than 1910. That in turn entails that the then owner of the land over which it ran had the necessary intention to dedicate at common law (because there was no statutory presumption of dedication at that time). The action
G o[redacted] (who was in fact the owner of the soil) in claiming that Rowden Lane was a highway is in itself powerful evidence of previous dedication. At the time of the Finance Act Map it is also clear from all the cartographic evidence that Rowden Lane was physically capable of accommodating vehicles. Not only that, but the first claimant asserts that it was in fact used by vehicles (although not by members of the public). It had existed in that physical configuration for centuries.

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81 In 1937 a [redacted] submitted plans to the Chippenham Borough Council for the construction of a bungalow to be built on Rowden Lane. The plans also showed a road, 12 feet from kerb to centre together with a footpath to be "made up to town council byelaws". At the time the borough council had statutory powers under section 30 (1) of the Public Health Act

1925 to declare by order that "an existing highway" be a "new street" for the purpose of the application of local byelaws. The borough council had in fact adopted such byelaws in 1925. These required a new street to be laid out as a carriage road. It was clearly established that in March 1937 the borough council resolved to make such an order declaring Rowden Lane to be a new street. What was not so clear was whether the resolution was put into effect by means of a formal order. The judge concluded that it had: para 817. Although this conclusion is challenged, it does not seem to us that it matters. The fact of the resolution is itself evidence of the status (or at least the reputed status) of Rowden Lane at the time. That is indeed how the judge treated it. He said (para 819):

> "I repeat that the making of the declaration did not alter legal rights. It did not create Rowden Lane a public vehicular highway, if it had not been one before the resolution. However, I am satisfied, on the balance of probabilities, that it is right to infer that the council resolved as it did, because it was apparent to it that Rowden Lane between the Bath Road and the cattle grid was already a public vehicular highway. Had they been of the view that it was merely a private road, but subject to public bridleway or footpath rights only, it seems improbable that they would have imposed on those undertaking the residential development of Rowden Lane the requirement of laying out a carriage road to provide the principal access to those dwellings over no more than a bridleway."

82 Mr Laurence stressed the general benefit to public health that the inhabitants of Rowden Lane (or perhaps of Chippenham generally) would have enjoyed as a result of the application of the byelaws to Rowden Lane. But in our judgment the judge was right in saying that to resolve to require [redacted] to upgrade a bridleway to the physical condition of a public carriageway all on account of a bungalow would have been overkill (or, as we now say, disproportionate).

83 In the immediate post-war period a number of reports recommended a national survey of public rights of way, especially rights of way on foot and with horses. Part IV of the National Parks and Access to the Countryside Act 1949 ("NPACA") was the result. Lord Denning MR explained in *R v Secretary of State for the Environment, Ex p Hood* [1975] QB 891, 896:

> "The object of the statute is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835. They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: Once a highway, always a highway. But nowadays, with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968. In 1949 the local authorities were required to make inquiries and map out our countryside. First, a draft map; next a provisional map; and finally a definitive map. There were opportunities

A both for landowners and the public to make their representations as and when each map passed through each stage. In 1968 there was to be a review and reclassification."

84 In order to understand the framework it is necessary to refer to some of the statutory definitions contained in section 27 (6) of NPACA. First, a "footpath" means "a highway over which the public have a right of way on
B foot only . . ."

85 Second, a "bridleway" means

"a highway over which the public have the following, but no other, rights of way, that is to say, a right of way on foot and a right of way on horseback or leading a horse, with or without a right to drive animals of any description along the highway."

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86 Third, a "public path" means: "a highway being either a footpath or a bridleway."

87 It follows, therefore, that a highway over which the public have a right of way with vehicles cannot be either a footpath or a bridleway. Nor can it be a public path. Lastly a "road used as a public path" (or "RUPP") means: "a highway other than a public path, used by the public mainly for
D the purposes for which footpaths or bridleways are so used."

88 It follows from the statutory definitions that a RUPP is a highway over which the public have rights of way with vehicles (since public paths are excluded from the definition). It also follows that a *private* carriageway over which the public have access on foot or on horseback only cannot be a RUPP. The highest status it can have is that of a public path. The compiling of the draft map, the provisional map and the definitive map were required
E to show any way which in the opinion of the authority "was . . . or was . . . reasonably alleged to be" a RUPP: section 27(2) of NPACA.

89 In accordance with their statutory duties the council carried out the required survey. The judge recorded the process, at paras 773–775. The Claim Map, Draft/Provisional and eventual Definitive Maps, showing and recording the public rights of way in Chippenham borough, all showed
F sections A and B of Rowden Lane coloured as a full public highway or, on this map, as an uncoloured town street with lesser rights of way being claimed only over the unenclosed section, section C, of the lane. Section C of Rowden Lane was claimed as a public right of way, CRB5. This acronym was a non-statutory subset of the statutory category RUPP. It was contained in a memorandum prepared by the Commons Open Spaces and Footpaths Preservation Society and approved by the Ministry of Town and County
G Planning. One subdivision was CRB which stood for a carriage road mainly used as a bridleway. The other was CRF which stood for a carriage road used mainly as a footpath. The memorandum said: "Highways which the public are entitled to use with vehicles but which are in practice mainly used by them as foot ways or bridle ways should be marked on the map as 'CRF' or 'CRB'."

H 90 The important point is that both subdivisions acknowledged that the public were entitled to use the way in question with vehicles.

91 The judge commented (para 775):

"It is unlikely that the council would have claimed CRB5 as a cul-de-sac way, and it is likely that it regarded the enclosed sections A and B of

Rowden Lane as having full public vehicular rights to the point where it connected with CRB5." A

92 [redacted] who then owned Rowden Farm, challenged the claim that section C was a RUPP. The ground of his challenge was that Rowden Lane was not a public way at all. This challenge led to an inquiry before an inspector in March 1955. The inspector rejected the challenge because he found that there was evidence of considerable use by the public; and B section C was therefore shown on the definitive map as part of a RUPP: paras 832, 833. It is noteworthy that [redacted] did not make an alternative challenge that if there were public rights of way they were limited to passage on foot or horseback. If he had made such a challenge, the way might have been recorded as a footpath or as a bridleway. But it was not.

93 In addition the only way in which a vehicle could access section C C was by passing along sections A and B. If, therefore, section C was subject to public rights of passage with vehicles, it inexorably followed that so were sections A and B. The Definitive Map was accompanied by a Definitive Statement. That stated in relation to RUPP5 (i e section C of Rowden Lane): "CRB from the eastern end of Rowden Lane leading south east along the entrance road to Rowden Farm, to the Lacock Parish boundary, 100 yards D west of Rowden Farm buildings."

94 The judge regarded the treatment of Rowden Lane on the definitive map as strong evidence. In his words, at para 837:

> "I regard this as cogent and compelling evidence that, in or about 1950, Sections A and B of Rowden Lane were regarded as full vehicular highways. It was compiled by someone who could be taken to have E knowledge of the highway network at the time."

95 He added, at para 844:

> "I accept the [council's] submission that the material point here is that there is before me now a record made in 1955 of an inspector, who had received and evaluated evidence (which has since been lost) through a statutory forensic process. He found as a fact that considerable public F user of section C of Rowden Lane supported its inclusion on the definitive map, not merely as a public footpath or a bridleway, but as a public cartway albeit mainly used in 1950 as a bridleway. The only way in which the public could gain access with vehicles to RUPP/Chippenham 5 in the 1950s was by driving along sections A and B of Rowden Lane. This was because in the Draft and subsequent Maps, the enclosed section of G Gipsy Lane was shown as bridleway 2A. Vehicular access was therefore not possible from Gipsy Lane in 1950. In fact, it is probable that Gipsy Lane had been closed to vehicles since about 1910, before the date of the Finance Act Map."

96 Mr Laurence said that no legitimate inference could be drawn from this material about the existence of vehicular rights of way over sections A H or B of Rowden Lane. The first reason he gave was that it was no part of the function of an inquiry under NPACA to deal with the status of public carriageways. However, the first claimant's case is that sections A and B of Rowden Lane were not in fact subject to any public vehicular rights. In that case the highest possible classification those sections of Rowden

A Lane could have commanded was classification as a RUPP (on the basis that it was "reasonably alleged" that public vehicular rights existed), although on her case they should have been classified as a public path. Since the object of the statutory inquiry under NPACA was precisely to record public rights of way on foot and on horseback (including RUPPs), if the first claimant is right sections A and B should have been investigated. The fact that they were not is some evidence that they were reputed to B be public carriageways. The second objection is that the inclusion of section C of Rowden Lane as part of a RUPP shows no more than that the inspector formed the view that it was "reasonably alleged" that the public had vehicular rights of way over section C. That is a fair point, as [redacted] acknowledged. In our judgment the judge may well have given too much weight to the results of the definitive map process. But this was C only one strand in the evidence; and the fact that he may have given too much weight to this particular piece of evidence does not, in our judgment, fatally undermine his overall conclusion.

97 Mr Laurence's principal criticism of the judge really boils down to two main points. First he says that the judge placed too much reliance on the small scale commercial maps, which he should have ignored. Instead he should have concentrated on the large scale plans. Second, the topography D shown by the larger scale maps makes the allegation that Rowden Lane was part of a thoroughfare improbable.

98 We deal first with the argument that the judge should have ignored what he called the "small scale maps" entirely; and should have concentrated only on the large scale maps (i e principally the 1784 map). We reject that submission. First, it conflicts with the statutory instruction in E section 32 of the 1980 Act which says that the court "*shall* take into consideration *any* map, plan or history of the locality or other relevant document which is tendered in evidence, and shall give such weight thereto as the court or tribunal considers justified . . ." (Our emphasis.) Second, the consistency of treatment of Rowden Lane and Gipsy Lane in commercially produced maps for well over a century showed, if nothing else, the reputation enjoyed by Rowden Lane. Section 12 of the Planning F Inspectorate Consistency Guidelines (2nd revision June 2008) (which Professor Williamson produced) concludes by quoting a paper by Christine Willmore dealing with old maps:

> "What is looked for is a general picture of whether the route seemed important enough to get into these documents fairly regularly. A one-off appearance could be an error . . . consistent depiction over a number of G years is a positive indication."

99 That is the approach that the judge adopted, testing each provisional conclusion against what had come before and what came after. In our view the judge's approach to "consistent depiction" was fully justified.

100 The second main argument rests on topography. According to Professor Williamson Rowden Lane and Gipsy Lane (which were two parts H of the thoroughfare found by the judge) meet in an acute V shaped junction. The argument is that it would have been very difficult (although not impossible) for a horse and cart to negotiate the V shaped junction. If Rowden Lane and Gipsy Lane had been used as a connected through route, then horses and carts would have had to have cut the corner. If they

had done this with any regularity then there would have been visible traces of cart tracks, which the map-makers would have recorded. The judge dealt with this point, at para 676:

> "I am not persuaded that the junction of the two tracks, section C and the southernmost continuation of Gipsy Lane, form the impractical 'V' junction described by Professor Williamson, nor that they are simply different private access tracks to Rowden Farm. Rowden Farm Lane is narrower than either Rowden Lane or Gipsy Lane, and there is no visible obstruction on the plan to stop the corner being cut at the 'V' junction."

101 As we have pointed out, many of the commercial maps (including the Ordnance Survey map of 1828) showed a junction at a less acute angle than that to which Professor Williamson spoke. At least two maps (including the 1784 map on which Mr Laurence relied heavily) showed a bulge which could have represented a place for carts to manoeuvre. In addition as the judge pointed out in the quoted passage, the width of Rowden Lane and Gipsy Lane (as compared with Rowden Farm Lane) might have left space for at least smaller two-wheeled carts to make the turn. It must also be recalled that the judge had a site view of which he took full advantage. We are not persuaded that the point about the V shaped junction, even if correct, is of such force as to outweigh all the other material that led the judge to his conclusion.

102 In addition it must not be forgotten that one strand in the council's case was that the disputed section of Rowden Lane was a vehicular highway even if it did not form part of a through route. [redacted]ad said that there was sufficient attraction along its length to cause the public to use it with vehicles. Professor Williamson appears to us to have accepted this. Thus the question whether vehicles would have negotiated the junction at point K with more or less ease was not determinative of the case.

Maintenance

103 Part of the judge's reasoning was informed by his consideration of evidence of maintenance. It is common ground that proof that a way has been maintained at public expense is evidence that it is a highway. Among the documents that the council disclosed was a minute of the Chippenham borough council from February 1881. It related to a bridge which crossed a brook in section A of Rowden Lane. At that meeting, a letter from [redacted], the highway surveyor of the Chippenham highway district, was read. It asked the council to join with the other owners of adjoining property in contributing towards the repair of a bridge over the brook in the lane leading to Rowden Farm and the field called Hulberts Hold belonging to the corporation. It was proposed by [redacted] and seconded by [redacted] that the council should contribute one tenth of the expense which would be about £1. This was then agreed.

104 Professor [redacted]attached particular importance to this minute. He said that it demonstrated that the council and other landowners with property along the lane were behaving in precisely the same way as the residents do currently: contributing equally to its upkeep. This, he said, was inconsistent with a belief that Rowden Lane was a public highway. The judge dealt with this point:

A "726. For me, the interesting thing about this minute is that the letter had been written by the *Highway Surveyor*. He was asking for contributions for the repair of the bridge. Why was the Highway Surveyor involved, if Rowden Lane was entirely private? Moreover, he was merely asking for a contribution towards repair, he was not suggesting that the adjoining owners were obliged to do so.

B "727. In my judgment, the fact that the person taking responsibility of the project was the Highway Surveyor provides support for the view that Rowden Lane was regarded at the time as a public vehicular road. A bridge, especially of that width, would not have been necessary if Rowden Lane were a mere bridleway." (Original emphasis.)

105 We do not find the first of the judge's points persuasive. The request, after all, concerned the repair of a bridge: so who better to deal C with it than the council employee who knew about roads and bridges? The second point seems to us to be equivocal. If, as the council say, Rowden Lane had been dedicated as a highway before 1835 then the highway would have been liable to be repaired by the parish, rather than by the frontagers. On that basis, the minute does not support the council's case. On the other hand, if the highway had been dedicated after 1835 then it would not D automatically have been repairable by the parish. It would only have become repairable at public expense if it had been adopted. If that is the explanation for this minute, then it is consistent with the council's case. However, building on the bedrock that it is common ground that there was some kind of highway over Rowden Lane, the judge's final point namely that a bridge of this width would not have been needed if all that was in question was a bridleway is a good one.

E 106 He returned to this point later in his judgment when he said, at para 916:

"I have already dealt with the 1881 minute concerning the repair of the bridge in section A of Rowden Lane, when dealing with Professor Williamson's observations on it above. In addition, it must be remembered that, given the claimants' concession that sections A and B F are public highways, much of the force of his argument has evaporated. In my judgment, the 1881 minute indicated not only that section A was a publicly maintainable highway but also the fact that a bridge needed to be repaired indicated that it was a public vehicular highway, since the presence of a bridge bearing a track way over it was much more consistent with a public vehicular way than a public footpath or bridleway."

G 107 Although we would not go so far as to say that this particular minute positively indicates that Rowden Lane was a highway, the remaining points are well made. All in all we would not place any real reliance on this episode one way or the other.

108 In the 1950s, Rowden Lane had a hard surface of compacted gravel. At this stage, there was no further evidence of the council or of any H highway authority taking responsibility for the maintenance of the lane. Potholes appear to have been filled in on an "ad hoc" basis by adjacent property owners. In the 1960s, the lane was resurfaced, and this was paid for effectively by the farms and businesses on Rowden Lane. In 1965 the borough council minutes revealed approval of expenditure by the council for the improvement of Rowden Lane (in conjunction with the brewery that

owned the pub). This was about the time that the pub was rebuilt, and as part of the conditions of the planning permission Rowden Lane was to be widened. This necessitated the giving up of some land by the brewery, which it did. This can realistically only be interpreted as a dedication by the brewery.

109 Following the local government reorganisation in 1972 the Wiltshire County Council became the highway authority in place of Chippenham Borough Council. Records were transferred from the latter to the former. However, the records transferred by Chippenham Borough Council to Wiltshire County Council showed only section A of Rowden Lane as a public carriageway. Section B was shown as part of RUPP5. This designation of section B contradicted the definitive map (although it would still have recognised the existence of a public right of way with vehicles). The judge held, at para 789, that this was a mistake which was corrected in 1983. Since at least 1972 a culvert running under section A of Rowden Lane has been maintained at public expense. Presumably this culvert enclosed the brook which had been crossed by the bridge referred to in the borough council's minute of 1881. Since that time or earlier section A as a whole has also been maintained at public expense.

110 The mistake about section B came to light in 1983. In or about 1983 the highway authority resurfaced Rowden Lane. The sections that were resurfaced were sections A and B: para 389. It was the first recorded work to section B at public expense. It was this that brought the mistake to light, because someone in the council queried whether public money should have been spent on section B. Upon investigation it transpired that section B had been incorrectly recorded on the definitive map as part of RUPP 5. That error was corrected. Since that time the council has accepted liability to repair both sections A and B of Rowden Lane (although its cash resources have rarely resulted in actual work).

111 [redacted] who argued this part of the first claimant's case, submitted that the 1881 minute did not support the council's case. For the reasons we have given, we agree. He also submitted that the evidence of contributions made by the frontagers to the resurfacing of Rowden Lane in the 1960s contradicted the council's case. We agree with that too. On the other hand, the council has maintained the culvert since 1972; and has accepted responsibility for the repair of section B of Rowden Lane since 1983. It has carried out work to section A of Rowden Lane since before then. No one has been able to suggest how section A of Rowden Lane could have a different status as a highway from section B. All in all we conclude that the evidence of maintenance (or lack of it) does not contribute significantly to either side's case.

Conveyancing evidence

112 It is now time to consider the conveyancing evidence on which the first claimant heavily relies. As one might expect parcels of land accessed from Rowden Lane have changed hands from time to time. Some light may be shed on the status of Rowden Lane by the way in which access was dealt with by local conveyancers. Mr Laurence accepts that the conveyancing evidence does not all point to the same conclusion. There may be cases in which private conveyancing documents all point one way: viz to the conclusion that there was no highway. In such a case the force of the

A evidence of private conveyancing documents may outweigh the value of public documents such as a tithe map or a Finance Act assessment which were not prepared for the express purpose of recording public rights of way. *Maltbridge Island Management Co Ltd v Secretary of State* [1998] EGCS 134 is one such example. But in the present case it is accepted that the private conveyancing documents do not speak with one voice. Moreover, in so far as they suggest that there was no highway at all they are B simply wrong.

113 It is a general principle of the interpretation of conveyances that where land is bounded by a river or a public highway a conveyance of the land will pass half the river bed or half the soil of the highway, as the case may be. This principle is clearly articulated by this court in *Micklethwait v Newlay Bridge Co* (1886) 33 Ch D 133. All three Lords Justices approved C the principle. It is only necessary to quote one of them, Lopes LJ, at p 155:

> "if land adjoining a highway or a river is granted, the half of the road, or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this though the measurement of the property which is D granted can be satisfied without including half of the road or half of the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road."

114 It will be noted that the presumption comes into play when the land in question adjoins a highway. In *Leigh v Jack* (1879) 5 Ex D 264 E Cockburn CJ explained the rationale for the presumption, at p 270:

> "It is presumed that those who were seised of the neighbouring land devoted the surface of their soil to the public, in order to confer a common benefit on all those desirous of using the highway, without, however, parting with the ownership of the soil itself."

F **115** In other words the presumption is founded on the assumption that the land is bounded by a highway (i e that there has been a dedication and acceptance by the public), and upon the further assumption that the surface of the land is vested in the highway authority. In those circumstances it is difficult to see how the application of the presumption could lead to the conclusion that the owner of land adjoining the highway could have rights of vehicular passage over the surface of the highway otherwise than in his G capacity as a member of the public. Nor, of course, does the application of the presumption give the landowner any right of passage over the other half of the highway in question; or over land forming part of a highway that is not coterminous with his own.

116 The argument based on the conveyancing documents has a number of strands. The first is that there are conveyances from the 19th and 20th centuries that expressly convey parts of section B of Rowden Lane. H These conveyances are respectively dated 11 April 1820, 28 October 1836, 31 July 1841, and 30 April 1919. It is difficult to see how this really advances the first claimant's case. Before 1836 no part of the highway would have been vested in anyone other than the frontagers. Until the last quarter of the 19th century only the scrapings would have been vested in the

surveyor. Even after that, the land itself (apart from the surface of the highway) would have belonged to the frontagers, so a conveyance of the soil of Rowden Lane is not inconsistent with the existence of a highway. Moreover, as Mr Laurence points out, the principle of interpretation would pass these parcels (minus the surface of the highway) even if the conveyances did not mention them at all.

117 The second strand is that where conveyance plans depicting Rowden Lane have survived from 19th century conveyances, it is not expressly called Rowden Lane but the way is annotated with the words "From Rowden Farm" or "To Rowden Farm". This contrasts with the depiction of the main road labelled "To Bath" or "To Chippenham". The inferences that the first claimant seeks to derive from these plans are twofold: that the label "To" or "From" Rowden Farm only suggests that there was no through route, and that the reference to the way serving Rowden Farm suggests that it was a private track. The conveyances with these features include conveyances of 3 November 1851, 29 September 1858, an abstract of title of 3 March 1884 and another dated 5 March 1884; and there is a similar notation on auction particulars in 1881. If these inferences were relied on in order to advance a case that there was no highway at all, they might well have some force. We come back (yet again) to the fact that it is common ground that Rowden Lane is agreed to have been a highway (open at least to pedestrians and riders). So these annotations on the plans must be seen in the context of their describing an acknowledged highway. Moreover the 1669 enclosure map shows the same road as leading to "Rowden Farm *and other lands*"; and the 1784 plan calls the disputed section of Rowden Lane "Rowden Down Lane" as opposed to "Rowden Farm Lane".

118 The third strand is that in 1927 the Lackham Estate was put up for sale in lots by auction; and auction particulars were prepared. Four lots bordered Rowden Lane. The catalogue description of each said that it was accessed by a "private road"; and the special conditions of sale envisaged that each purchaser would be required to contribute to the cost of upkeep. The argument based on this is that given the public nature of the auction and the likelihood of close public scrutiny, the fact that these auction particulars were "of the utmost importance". It can be accepted that these auction particulars do point to the conclusion that whoever drew them up thought that Rowden Lane was a private road. But the fact is that the draftsman of the particulars was wrong. Rowden Lane was a highway (open at least to pedestrians and riders). It would have been misleading simply to call it a "private road". So while the judge might have given more weight to this piece of evidence than he did, it is an exaggeration to describe it as "of the utmost importance". It is one piece of evidence among many; albeit one of the few pieces of evidence that positively supports the first claimant's case. But its force is blunted by the fact that the provision in the special conditions of sale about contributions to the upkeep of the road was not carried through into any conveyance.

119 The Lacock Estate was conveyed in 1927 to a [redacted] The conveyance to him granted a right "so far as the vendor has power to grant the same" to pass and repass "with or without horses cattle and other animals carts waggons carriages motor cars and agricultural implements" over Gipsy Lane. The conveyance also included a similar right "so far as the

A vendor has power to grant the same" over Rowden Lane, which the conveyance described as "the lane or roadway leading from Rowden Farm to the Main Bath Road". We accept that the grant of an express right of way over Rowden Lane is suggestive that it did not have the status of a highway. However, the draftsman of this conveyance was, no doubt, under the same misapprehension as the draftsman of the auction particulars prepared earlier in the same year. Moreover the granted right includes both passage on foot B and with horses and other animals, both of which were already existing public rights, even on the first claimant's case. Not surprisingly, subsequent conveyances which had the 1927 conveyance as their root of title repeated the grant.

120 In addition, although Mr Laurence placed reliance on section 62 of the Law of Property Act 1225 and its predecessor section 6 of the C Conveyancing Act 1881 which obviate the need to include general words in conveyances, these provisions apply only to conveyances made after 31 December 1881. In so far as there are conveyances that pre-date 1882 which do not include general words, they tend to support the inference that Rowden Lane was a vehicular highway.

121 The judge recorded that a number of other conveyances dealing with land adjoining Rowden Lane did not include any express right of way D over the lane. These included in particular the resolution to grant the lease of what became the hospital. The judge reasoned, at para 907(5):

> "Given the absence of private easements in favour of the properties fronting Rowden Lane, they and Rowden Farm would be landlocked if Rowden Lane were not a public vehicular highway. The fact that the parties did not include any part of the road in the conveyance, and also E failed to stipulate for private access rights, renders it probable that everybody realised that the road had become a public vehicular highway. Even if the current owners of property fronting Rowden Lane owned one half of the subsoil of Rowden Lane which adjoined property, this did not give a right of way over the entire length of Rowden Lane to gain access to the A4."

F

122 The important fact is that the soil of Rowden Lane never belonged to the owner of Rowden Farm and there is no evidence of any grant of a right of way. It is improbable in those circumstances that Rowden Lane was no more than a private carriageway serving Rowden Farm. The situation on the ground is quite unlike that described by Lord Dunedin in *Folkestone Borough Council v Brockman* [1914] AC 338.

G **123** Mr Laurence fills the gap by suggesting that the frontagers would have acquired vehicular rights of way by prescription. Given that the premise is that Rowden Lane is a highway we find it difficult to see how private prescriptive rights of passage can come into existence. The status of Rowden Lane as a highway (which everyone agrees) is dependent on the inference that at sometime in the past there was a dedication. As far as one can tell that dedication must have taken place at a time when Rowden Lane H was actually being used by carts and other vehicles (otherwise the prescriptive rights for vehicular use would not have come into existence). The existence of a prescriptive right depends on the inference (which may be fictional) of a grant or grants. In this case Rowden Lane ran through land owned by many different owners; so a series of grants would have to be

presumed. The presumed grants would have had to have been made not only in favour of the owner for the time being of Rowden Farm but also in favour of all those other persons who from time to time owned land abutting Rowden Lane. They would have to have been made by a series of landowners each of whom owned a part of the soil over which Rowden Lane ran. Why, then should it be inferred that the dedication was a limited dedication, subject to the frontagers' private rights to use Rowden Lane with vehicles, rather than a dedication which reflected the actual use made of the lane, which included use with vehicles? To infer a whole series of grants and dedications running in parallel is unnecessarily complicated. The principle of Occam's razor surely applies here. The simpler explanation for the factual state of affairs is that there was an unlimited dedication. Accordingly in our judgment the judge's reasoning was correct.

124 We return to the question posed by the judge: given the width and nature of Rowden Lane from the earliest recorded times, how does it come about that there has been a dedication for use by pedestrians and riders but not for horses and carts? A passage in Professor Williamson's cross-examination on Day 4 went like this, at pp 129–130:

> "*Q*. And if they wanted to go along with horses, can you think of any reason why they might want to go along with horses but not want to go along pulling a cart behind the horses?
>
> "*A*. It might reside in the extent to which the use was tolerated, when dedication occurred, i e you might be prepared to tolerate user on foot or by horseback in the same way you might not be prepared to tolerate full use by vehicles largely because of damage done to road surfaces and to crops and standing fields etc. There might be reasons why you would allow one and not the other."

125 If this hypothesis were correct it would lead to the conclusion that vehicular use of the way was not tolerated. But if that were the case, then prescriptive rights would not have arisen either. It is quite implausible to suggest that the landowners over whose soil the way ran would have checked passing vehicles to see whether they belonged on the one hand to frontagers along the way or to persons using the way at the invitation, express or implied, of those frontagers; or on the other hand to members of the public. It is the sort of factual inference that Mr Laurence rightly accepted would be unsustainable.

126 The judge summarised the findings that led him to conclude that Rowden Lane was a highway usable by the public on foot, with animals, and with vehicles, at para 953:

> "(i) Rowden existed as a location since at least 1190.
>
> "(ii) The borough lands were seized by the Crown in 1540, and allotted to the 'inhabitant householders' of Chippenham. This was a group large enough to constitute 'the public'. They probably used horse drawn carts and wagons to carry away wood from the coppice which became their land by 1544. These inhabitants of Chippenham have used Rowden Lane to access the coppice either via the two spur roads, if they existed before 1669, or over the unhedged southern boundary of Rowden Lane before the spur roads were created.
>
> "(iii) The unruly and disorderly members of the public from Chippenham or elsewhere, who trespassed in and stole wood from the

A coppice, also constituted a sufficiently large constituency of people to constitute the public. No complaint was made that they were trespassing on private roads when they were undoubtedly using Rowden Lane to gain access to the coppice. The borough of Chippenham did not own Rowden Lane and therefore could not give consent to anyone to use Rowden Lane.

"(iv) Soldiers with horse drawn wagon and carts must have used Rowden Lane to access Rowden Manor during the Civil War. Such B soldiers must have constituted members of the public, and their use of Rowden Lane must have been trespassory.

"(v) By 1669, Rowden was a well established place to which both Gipsy Lane (as it was to become) and 'Rowden Way' gave access.

"(vi) In 1669, sections A and B of Rowden Lane had a distinct name, i e 'Rowden Way'.

C "(vii) Rowden Lane and Gipsy Lane, as they were to become known, contained the word 'lane' in their name implying a highway running between two major roads or different sections of the same major road. The presence of a useable through route from the Bath Road, along Rowden Lane, over the unenclosed track, up Gipsy Lane and back on to the Bath Road is clearly demonstrated on historical maps. There are sound reasons why such a through route existed. They include the D potential avoidance of paying tolls, the avoidance of badly maintained or unpassable sections of the Bath Road and, at least for a time, to provide some form of access from Gipsy Lane to the market place in Chippenham. This through route is shown in the maps of 1773, 1792, 1828, 1829, 1848, 1862, 1867, 1890 and 1910. Professor Williamson accepted that the maps of 1773 1828 1829 and 1890 demonstrated a E through route.

"(viii) Apart from gates shown at the junction of the Bath Road and section A of Rowden Lane in the 1784 and 1796 maps, no such gates are shown in the maps of 1669, 1848, 1867, 1900, 1910, 1953 and 1974, nor in the aerial photographs of 1946, 1950, 1964 and 1973. Moreover, even by 1784, it is likely that sections A and B of Rowden Lane were a public highway on foot at the very least, and so it is likely that the public was not F excluded from using Rowden Lane in carts or wagons, especially since it was eminently suitable for that use.

"(ix) Spurs 1 and 2 leading to Hulberts Hold and the coppice, south of Rowden Lane, have been depicted in a way similar to Rowden Lane. This is consistent with the use of Rowden Lane and the spurs, by the public in wagons and carts, to gain access to the borough lands, including G the coppice.

"(x) There is an abundance of evidence to justify the inference, which I draw, that Rowden Lane was dedicated to and used by the public as of right with wagons and carts. The public used this to gain access to the borough lands, the infectious hospital (as shown in the 1896 minute in relation to Hulbert Hold, a piece of land owned by the council until 1947), those persons ruly and unruly who used the coppice to cut and H gather wood, soldiers and those using the football ground shown on the 1910 map. Moreover, as the claimants' admission, namely that sections A and B of Rowden Lane was a public highway subject to public rights on foot and horseback, showed, the public had a real reason for using Rowden Lane. Either it was a place of public interest or the public

had a particular purpose for using it. Given this admission, and the width and level of maintenance of Rowden Lane over the centuries, it seems likely that the public would also have used it with wagons and carts. It must be remembered that the coppice was not common land after 1540 and, after 1669, previously common land had been enclosed. After 1669 the use of Rowden Lane would not have been by commoners as an incident of common.

"(xi) Sections A and B of Rowden Lane have been shown to be of a higher standard of status than section C. If, which I reject, section C of Rowden Lane was only a bridleway before the 1970s, sections A and B are, therefore, of a higher status, namely a public vehicular highway.

"(xii) There are, and have been no obstructions or gates limiting or restricting access between sections A and B of Rowden Lane.

"(xiii) There were never any 'Private' signs before 2002.

"(xiv) The manner in and the standard to which sections A and B were maintained (see the Minute of 1881 and the shading on the 1900 map and the quoted correspondence dealing with maintenance), indicate that the highway authority had been maintaining, however intermittently, sections A and B of Rowden Lane.

"(xv) The 1896 minute in relation to the infectious hospital clearly justifies the inference that the council considered Rowden Lane was then a public highway, because otherwise the infectious hospital would be landlocked, given the absence of any private easement *over* Rowden Lane. [Original emphasis.]

"(xvi) The maintenance of the bridge in section A, as shown in the 1881 minutes, would be unnecessary if Rowden Lane were then merely a public highway on foot or on horseback. A wide bridge maintained by the highway authority was plainly excessive if the only public rights were on foot or on horseback.

"(xvii) Rowden Lane was shown on some of the less ancient maps as comprising a track with verges. This is more indicative of a public vehicular use rather than use confined to foot or horseback.

"(xviii) I draw the inference that Gipsy Lane too was a public vehicular highway, on the totality of the evidence, including the shading shown on the Ordnance Survey Map for 1900, the 1910 map and the fact that it bore the name 'Gipsy' Lane. This clearly implied the use of that lane with carts and wagons by travelling gipsies. That use could not have been with the permission of Rowden Farm, since Gipsy Lane was not owned by Rowden Farm. The fact that Gipsy Lane was also a public vehicular highway supports the useable through route contention. Moreover, the Perkins drawing of 1905, derived from maps and other documents which he had seen, referred to a 'cart track' going across the unenclosed sections of Cunniger and Home Down fields.

"(xix) Utilities are found in sections A and B of Rowden Lane. There is no wayleave agreement permitting this, and the inference is that they were installed in the highway under statutory powers. Whilst these are not probative on their own of in public vehicular highway, they are entirely consistent with it.

"(xx) A public house has existed at the corner of the Bath Road and section A of Rowden Lane for many centuries. In the 1960s, when a new

A public house was built, the then narrow section A of Rowden Lane was widened by the dedication of land by the brewery. This could only reasonably have been accepted by the highway authority on the basis that the then existing narrow section A was also public vehicular highway.

"(xxi) Professor Williamson's report virtually admits that section A is a public vehicular highway, and this fact had been conceded by the claimants up to November 2008.

B "(xxii) The 1910 Finance Act is strongly supportive of sections A and B as a wholly untaxed public vehicular highway, as opposed to a private road subject to deduction for minor highway rights.

"(xxiii) The 1937 Chippenham declaration of Rowden Lane as a new street, to be built to certain standards, would seem to be an over-exacting requirement, if the only public rights over Rowden Lane were on foot or

C on horseback.

"(xxiv) The definitive map process, from 1949 to the inquiry in 1955 (in relation to section C as RUPP 5 connecting with sections A and B of Rowden Lane) is highly indicative of sections A and B status as a public vehicular highway, especially when it was shown as such on the relevant maps. Nor is the strength of this conclusion in any way undermined, in

D my judgment, by the fact that section C was subsequently downgraded to a bridleway.

"(xxv) The private conveyancing documents, relating to transfers of property adjoining Rowden Lane, and in particular the absence of express grants of rights of way, are probably explicable on the basis that everybody had regarded the public as having full rights of way over Rowden Lane, as it was a public vehicular highway."

E

127 Even if some of these factual findings can be chipped away at the margins, in our judgment the judge was amply justified in concluding on the material before him that (even without reliance on the evidence of modern use) Rowden Lane was a vehicular highway.

128 The next question that the judge had to consider was the width of the highway. The judge recorded, at para 959, that Mr Laurence accepted

F that if the council established that Rowden Lane is an ancient public vehicular highway, then there is no reason to doubt the applicability of the hedge to hedge presumption. Since the judge did so find, and we have upheld his finding, this issue does not arise. The challenge to the judge's conclusion about the width of the highway was based on the premise that the sole reason for his conclusion was the presumption of dedication under

G section 31 of the Highways Act 1980.

NERCA

129 The judge rejected the first claimant's claim that any vehicular right of way for the public over sections A and B of Rowden Lane was extinguished by section 67 of NERCA. He dealt with it in chapter 22, paras 989–1159 of his judgment. We conclude that the judge was right on

H the points which have been argued substantially for the reasons he gave.

130 Section 67 of NERCA was enacted as a result of public concern about inappropriate use of "green lanes". Green lanes are minor unmade rights of way, over which vehicular rights of way existed but which were generally enjoyed by walkers and horseback riders. Users of mechanically

propelled vehicles ("MPVs"), such as motorcycles, were using some green lanes for recreational purposes and causing damage to them. A

131 Parliament reacted to this concern by restricting the ways that could be used for this purpose. The legislative technique chosen for this purpose was to graft, onto then recent legislation for the official recording of rights of way, the sanction of extinguishment for public rights of way for MPVs in default of such recording by midnight on 1 May 2006. That is the time when section 67 of NERCA came into effect ("the NERCA commencement date"). B

132 The intricacies of the legislative history are described in paras 7 to 13 of the judgment of Dyson LJ in *R (Warden and Fellows of Winchester College) v Hampshire County Council* [2009] 1 WLR 138, with which Ward and Thomas LJJ agreed. We have briefly outlined the legislative history at para 83 above and it is sufficient for our purposes at this stage to summarise the main steps. Initially, Part IV of NPACA required county councils to maintain definitive maps and statements showing (1) footpaths; (2) bridleways, and (3) RUPPs, or "roads used as public paths". As explained in para 87 above, RUPPS were highways other than footpaths and bridleways which were used by the public mainly for the purposes for which footpaths and bridleways are so used. NPACA was amended by the Countryside Act 1968. This required county councils to reclassify each RUPP as a footpath, a bridleway or a byway open to all traffic, or "BOAT". C D

133 In the Wildlife and Countryside Act 1981 ("WCA"), BOATs were redefined as highways over which the public have vehicular rights of way but which are used by the public mainly for the purposes for which footpaths and bridleways are so used. WCA made provision to amend the definitive map and statement and the *Winchester* case is concerned with the requirements for such applications. E

134 The Countryside and Rights of Way Act 2000 ("CROW") introduced a further requirement to distinguish between RUPPs still shown on definitive maps and statements that conferred the right to use MPVs and those that did not ("restricted byways"). These provisions reflect Parliament's concern that rights of way should be recorded on a register open to public inspection. F

135 The extinguishment of rights of way was a later addition to this process. In the first instance, CROW provided for the extinguishment of unrecorded rights to use ways for MPVs in 2026. However, section 67 of NERCA was subsequently enacted, which provided for their extinguishment in 2006.

136 Section 67(1) of NERCA thus provides for the extinguishment of rights of way which were either not shown on the definitive map or statement, or which were there classified as only footpaths, bridleways or restricted byways, i e not for use by MPVs: G

> "67. *Ending of certain existing unrecorded public rights of way*
>
> "(1) An existing public right of way for mechanically propelled vehicles is extinguished if it is over a way which, immediately before commencement— (a) was not shown in a definitive map and statement, or (b) was shown in a definitive map and statement only as a footpath, bridleway or restricted byway. But this is subject to subsections (2) to (8)." H

A **137** Section 67 is both dramatic and draconian. It had a "once and for all" effect at the NERCA commencement date. Parliament provided for exceptions from section 67(1), and they are set out in section 67(1)–(8). These exceptions include subsection (2)(b), which falls for consideration on this appeal. This provides:

> "(2) Subsection (1) does not apply to an existing public right of way
B if— . . . (b) immediately before commencement it was not shown in a definitive map and statement but was shown in a list required to be kept under section 36(6) of the Highways Act 1980 (c 66) (list of highways maintainable at public expense) . . ."

138 Thus the draconian provisions of section 67(1) did not apply if, even though the relevant rights did not appear in the definitive map and
C statement (or are so shown only as a footpath or bridleway), they were, immediately before the NERCA commencement date, shown in the list ("the list of streets") which the council is required to maintain by virtue of section 36(6) of the Highways Act 1980.

139 We now move away from examining the nature of section 67 of NERCA to examining the requirements of section 36. As the judge observes, this provides for a completely different kind of register, namely one relating
D to the maintainability of the highway, not the type of rights that it conferred. Thus section 36(6) (as amended by section 8 of and paragraph 7 of Schedule 4 to the Local Government Act 1985) provides:

> "The council of every county, metropolitan district and London borough and the common council shall cause to be made, and shall keep corrected up to date, a list of the streets within their area which are
E highways maintainable at the public expense."

140 The effect of the first claimant's claim was to throw on to the council the onus of proving that the exception in section 67(2)(b) was met. Accordingly, it is necessary to consider the statutory requirements relating to the list of streets. Section 36(7) (as amended by section 22(1) of an
F paragraph 4 of Schedule 7 to the Local Government (Wales) Act 1994) stipulates where the list of streets is to be kept, and provides for the list of streets to be made available for public inspection:

> "Every list made under subsection (6) above shall be kept deposited at the offices of the council by whom it was made and may be inspected by any person free of charge at all reasonable hours and in the case of a list made by the council of a county in England, the county council shall
G supply to the council of each district in the county an up-to-date list of the streets within the area of the district that are highways maintainable at the public expense, and the list so supplied shall be kept deposited at the office of the district council and may be inspected by any person free of charge at all reasonable hours."

H **141** There is no provision in section 36(7) for the Secretary of State to make regulations prescribing the form of the list of streets; in particular, whether it could be in electronic form. This may be contrasted with the provisions of section 31A of the 1980 Act (as inserted by section 57 of CROW). Section 31A deals with the information that a landowner must lodge with the council if he wishes to dedicate a right of way to the public.

This makes provision for the council to keep a register of maps, statements and declarations lodged under section 31(6). With effect from 1 October 2007, regulations made pursuant to section 31A provided for the manner in which this information was to be kept. In particular, it provided that it should be kept in both written and electronic form: the Dedicated Highways (Registers under section 31A of the Highways Act 1980) (England) Regulations 2007 (SI 2007/2334), regulation 4. Section 36(7) is, by contrast, completely silent as to the form of the list of streets. The explanation for why section 36 is silent on the medium in which the list of streets is to be kept will be addressed later in this judgment.

142 Returning to section 67 of NERCA, in this case, sections A and B of Rowden Lane were not shown in the definitive map and statement as a RUPP. They were coloured as an ordinary public road (although these sections did not form any part of the council's claim or the inspector's inquiry). In addition they were shown as a road maintainable by the council in a record that the council contended constituted its list of streets. They were indeed a road maintainable by the council as they had become a public vehicular highway before 1835.

143 The issue for determination in respect of this claim, namely the issue whether that record satisfied the exception in section 67(2)(b), was a mixed question of fact and law. Questions as to the actual form of the list and what it contained were questions of fact and questions as to what it should contain or the form it should take were questions of law. This appeal raises no question of fact under this issue and thus there is no doubt thrown on the judge's relevant findings of fact, to which we now turn.

144 The judge found as a fact that the council maintained its list of streets in the form of an electronic database, known as the Exor database ("EDB"). This contained all the information required to be in it as regards the categories of streets for which data was included in it. The EDB was accessible for the purposes of amendment and public inspection at the council's Trowbridge office. The list was headed "list of streets maintained at public expense". It revealed the date of inclusion of an entry so that a search could be carried out to disclose which streets were shown in the list of streets immediately before the NERCA commencement date. This finding disposes of the objection to the EDB on the basis that it did not reveal that information.

145 The EDB included some 19 streets that were in fact maintained at public expense even though they had not become maintainable at public expense. The judge dismissed an objection to reliance on section 67(2)(b) on the basis of their inclusion at para 1144 of his judgment.

146 More seriously, however, the EDB failed to include footpaths and bridleways and a category of minor roads, which the council was liable to maintain. As explained below, Mr Laurence argues that this is fatal to the council's reliance on it under section 67(2)(b). A person wishing to inspect an entry in the EDB could see relevant entries through the council's website, or from a computer terminal in the council's offices or from a printout provided by the council.

147 An entry in the EDB for sections A and B of Rowden Lane had been created in 1994, well before the NERCA commencement date, and could have been inspected on that date. The entry referred to those sections as an

A "adopted" road, which meant for this purpose that the council accepted that it was under a liability to maintain it.

148 The council also kept books known (by reference to their red binding) as the "burgundy books" containing information about roads that it maintained. The judge was prepared to say that, if the list of streets had to be kept in hard copy, these books satisfied the statutory requirements but we are not concerned with that holding. However, the judge's primary B conclusion was that the EDB constituted a list of streets, albeit a defective one for the purposes of section 36(6) of the 1980 Act, and that the exception in section 67(2)(b) of NERCA was, therefore, satisfied.

149 Mr Laurence's challenge to the judge's conclusions of law on the first claimant's NERCA claim falls into two main parts. First, he submits that the EDB could not qualify as the list of streets for the purposes of C section 36(6) primarily because the council had deliberately excluded minor highways, though he does not allege any bad faith on the part of the council. His second submission is directed to the lack of physicality of the EDB which he submits prevents it from being a qualifying list. The first claimant can succeed on her appeal if she succeeds on either of those points.

D *Was the EDB a list of streets for the purposes of section 36(6) of the 1980 Act and of section 67(2)(b) of NERCA?*

150 In support of his first submission, Mr Laurence adopts both a textual and a purposive approach of section 67(2)(b). He relies on the words "required to be kept" and on the concluding words in brackets "(list of highways maintainable at public expense)" in that subsection. These, he contends, are textual indications that the list of streets must be full and E complete. That means, he further submits, that the list of streets had to contain particulars of four categories of highways, namely (1) publicly maintainable footpaths; (2) publicly maintainable bridleways; (3) ordinary publicly maintainable public roads, and (4) minor publicly maintainable vehicular highways mainly used on foot and on horseback. In common with other councils, as Mr Laurence informed us, the council did not include the F fourth category in its list, nor indeed the first and second categories. In fact, the evidence of the council was that its website made that very point clear.

151 In support of his purposive argument, Mr Laurence submits that the self-evident statutory purpose of section 36(6) is that there should be an accurate list of streets available for inspection by the public. Nothing in the Parliament's attitude to the use of MPVs on minor highways was inconsistent with that policy, or diminished its importance. Furthermore, G the purpose of extinguishing vehicular rights of way for MPVs could not be carried out as Parliament had intended, that is, with an exception for those not shown on the definitive map and statement but included in the list of streets, unless there was full compliance with section 36(6).

152 Mr Laurence sought support for his purposive approach in the decision of this court in the *Winchester* case [2009] 1 WLR 138. That case concerned section 67(3), and not section 67(2)(b) of NERCA. Section 67(3) H contains a further exception from section 67(1): this applied, inter alia, if, before 20 January 2005, an application had been made under section 53(5) of WCA for an order making modifications to the definitive map and statement so as to show the way in question as a BOAT. However, section 67(6) of NERCA contains a stipulation for deciding when an

application under section 53(5) of the WCA was made: this stipulation provided that an application under section 53(5) of WCA was made when it was made "in accordance with" paragraph 1 of Schedule 14 to the WCA. and that, accordingly, the application was not valid of it was not so made. Therefore the local authority in that case could not rely on the exception to section 67(1) of NERCA contained in subsection (3). A

153 Mr Laurence submits that the strict approach of this court in that case means that the exception in section 67(2)(b) had also to be interpreted strictly. This court is thus required to be satisfied that the list of streets relied on by the council in this case was a list that complied with the requirements of section 36(6) of the 1980 Act. Accordingly, it would have had to include all four categories of highways. Otherwise the list must be rejected and this court must conclude that the exception was not satisfied. Since the *Winchester* case decides, as he puts it, that a qualifying application under section 67(3) was one that complied strictly with paragraph 1 of Schedule 14 to the WCA a qualifying list of streets under section 67(2)(b) had to comply strictly with section 36(6)(7). Moreover, submits Mr Laurence, the court must interpret section 67(2)(b) without any predisposition related to the merits of the defendant's case on this point. B C

154 Similarly, Mr Laurence submits that, since the EDB is not a list of all the streets required to be included in it, it was not a "list of the streets" for the purposes of section 36(6) and, therefore, the requirements of section 67(2)(b) are not met. While Mr Laurence accepts that a list of streets could contain inaccuracies requiring correction and still qualify as a "list" for the purposes of section 36(6), he submits that a list omitting three of the four categories of highway which should be included simply could not qualify. D E

155 The judge, at para 1092 of his judgment, rejected the argument that section 67(2)(b) of NERCA had to be strictly construed. He held that the exception was of obvious utility despite the different purpose of the list of streets from that of the definitive map and statement. He considered that the *Winchester* case was distinguishable as it turned on different wording in section 67, at para 1102.

156 [redacted] seeks to uphold the judge's judgment. If, in order for the exception in section 67(2)(b) to apply, the list of streets had to be fully compliant with section 36(6), there would be uncertainty as to whether a right of way was excluded from extinguishment because it would be necessary to look at the whole of the list and form an evaluative view as to the nature of the exclusions. His submission is that Parliament could not have intended that result. Moreover, if Mr Laurence's interpretation were correct, this court would have to write words into that provision such as "provided that the list complies with section 36(6) of the 1980 Act". This would amount to an impermissible rewriting of section 36(6), and this was outside the scope of interpretation. F G

157 [redacted] contends that the *Winchester* case [2009] 1 WLR 138 is distinguishable because the crucial words in that case were "in accordance with" paragraph 1 of Schedule 14 to the WCA. By contrast, in the present case the list must simply be one that is required to be kept "under" section 36(6) of the 1980 Act. H

158 [redacted] accepts that a "street" includes the highway. He also accepts, for the purposes only of this appeal, that Mr Laurence is correct in

A saying that the list of streets had to include all four categories of highways listed by him. However, [redacted] points out that this was not the view of the council as at the NERCA commencement date and that, accordingly, there is no evidence that the council took a deliberate decision not to comply with section 36(6) in the sense of taking a decision that the council knew would not comply with the statutory requirements.

B **159** We agree with Mr Laurence that the court must, in determining a question of statutory interpretation, steer between the Scylla and Charybdis of the textual and purposive approaches, but having thus set our course we arrive at a different destination from that of Mr Laurence. As a matter of plain language, section 67(2)(b) does not, in our judgment, require the list to be fully compliant with section 36(6). The requirement to which it refers is that such a list should exist, as was found to be the case by the judge.
C Moreover, section 36(6) of the 1980 Act contemplates that the list may require to be corrected. It none the less proceeds on the basis that what has to be corrected is a "list", even though it is defective in some respects. Therefore, a list can be a list for the purposes of section 36(6) even though it omits information that is required to be recorded in it, or contains an erroneous entry.

D **160** With regard to the purposive approach, we agree with [redacted] submission that Mr Laurence's interpretation of section 67(2)(b) would not promote the purpose of section 67. We understand Mr Laurence's concern that the list of streets should be accurate but the sanction for inaccuracy is not, in our judgment, to be found in section 67 of NERCA but in the enforcement of the statutory duties on public authorities under the 1980 Act, in the normal way, such as by the relator action. The truth is that
E the purpose of section 67(2)(b) is not to protect vehicular rights of way from extinguishment only where there is an accurate list of streets but to give effect to the concern about the misuse of green lanes described above. In the *Winchester* case [2009] 1 WLR 138, Dyson LJ sets out a passage from the foreword to a consultative document issued by the Department for the Environment and Rural Affairs in which the Rural Affairs Minister, Alun
F Michael, said, at para 11:

> "As Rural Affairs Minister, I have been approached by many individuals and organisations who are deeply concerned about problems caused by the use of mechanically propelled vehicles on rights of way and in the wider countryside. I share these concerns, having seen for myself examples of damage to fragile tracks and other aspects of our natural and
G cultural heritage in various areas of the country. There is considerable concern about behaviour that causes distress to others seeking quiet enjoyment of the countryside . . . I do not think that it makes sense that historic evidence of use by horse drawn vehicles or dedications for vehicular use at a time before the internal combustion engine existed can give rise to rights to use modern mechanically propelled vehicles. Those who suffer from vehicle misuse find this incomprehensible and in this
H paper we offer new proposals that are intended to address what many have come to view as the inappropriate and unsustainable way in which vehicular rights are acquired and claimed on rights of way."

161 As to the proposition, based on the *Winchester* case, that there must be strict compliance with section 36(6) of the 1980 Act for the

exception in section 67(2)(b) to apply, we agree with the judge and [redacted] that the case is distinguishable. That case turns on the provisions of section 67(3)(6). Most importantly section 67(6) requires the application to be "in accordance with paragraph 1 of Schedule 14".

162 We would add that the court in the *Winchester* case did not rule out the possibility of minor discrepancies being disregarded under the principle that the law is not concerned with very little things (de minimis non curat lex). This court gave further consideration to that qualification on the requirement for strict compliance in the later case *R (Maroudas) v Secretary of State for the Environment, Food and Rural Affairs* [2010] NPC 37 (Dyson, Richards and Jackson LJJ). That case made it clear that this court was prepared to contemplate "minor departures", for example the fact that, for a short period of time, the application was not signed as required by the form prescribed by regulations under Schedule 14 for use when making such an application. We accept, however, the complete exclusion of one or more categories of streets cannot be regarded as minor for this purpose. This does not undermine our conclusion on this issue because, for the reason given, the *Winchester* case is not here in point. The inaccuracies in the list did not cause it not to have the essential character of a list of streets. It in fact included over 11,000 streets maintainable by the council.

163 A number of other arguments were made to the judge. Mr Laurence argued for instance that the list had to identify itself as a list of streets pursuant to section 36(6) of the 1980 Act. He also argued that the list failed to comply with section 36(6) because there were some streets in it for which the council had not yet assumed liability for maintenance. The judge rejected these arguments, at paras 1140–1142, 1136, 1145–1146. We likewise reject those arguments. The character of the list was not affected by the inclusion of the 19 streets for which the council had not yet undertaken liability for maintenance. The judge went on to hold that the list of streets was "deposited" at the council's office in Trowbridge for the purposes of section 36(7). Consistently with our conclusion that a statutory list of streets can be kept in computerised form, the word "deposited" has to be interpreted compatibly with that possibility. In the light of our conclusions on the section 67(2)(b) issue, we expect the parties to be able to agree to an order for the dismissal also of that issue either forthwith or as soon as it finally becomes clear that it no longer needs to be decided.

Was the council entitled to keep the list of streets in computerised form?

164 The thrust of Mr Laurence's second submission centred on the fact that the council's list of streets was not kept in physical form. Mr Laurence submits that the EDB is not a list of streets at all because it was kept in computerised form. He further submits that the list must also be such that member of the public can inspect it in its physical form at the council's offices. The judge rejected this submission. Section 320 of the 1980 Act provides that documents required to be kept under that Act must be in writing:

> "All notices, consents, approvals, orders, demands, licences, certificates and other documents authorised or required by or under this Act to be given, made or issued by, or on behalf of, a highway authority or a council, and all notices, consents, requests and applications authorised

A or required by or under this Act to be given or made to a highway authority or a council, shall be in writing."

165 By virtue of section 5 of, and Schedule 1 to, the Interpretation Act 1978: " 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form, and expressions referring to writing are construed accordingly."

B **166** The judge moreover found that a person reading the EDB or a printout from it could read the entries in it so that the requirements of this definition of "writing" were met. There was no need for there to be any express statutory permission for the council to maintain its list of streets in electronic form, as Mr Laurence had contended.

167 In our judgment, there is no doubt that the judge was correct on this point. The position under section 36(6) is distinguishable from C the register governed by the section 31A regulations. In the latter case, the regulations had to provide for the register to be kept in computerised form because it was desired in that case that both hard and electronic forms of the register should be kept.

Conclusions

D **168** For the above reasons, we dismiss the appeal on this ground. The judge did not rule on a further issue whether the exception in section 67(2)(a) was available to the council. He adjourned that issue to a date to be fixed. In the light of our conclusions on the section 67(2)(b) issue, we expect the parties to be able to agree to any order for the dismissal also of that issue.

E *Result*

169 We conclude that the judge was right to find that sections A and B of Rowden Lane were a public vehicular highway, dedicated at common law. We also conclude that the judge was right to hold that public vehicular rights of passage over those sections of Rowden Lane were not extinguished by NERCA. We therefore dismiss the appeal.

F

Appeal dismissed.

GEORGINA ORDE, Barrister

G

H

Appendix 14

Planning Inspectorate Decision Letter FPS/A4710/7/22 723 dated 31 March 1999 as reported in Byway and Bridleway 1999/6/48 & 1999/7/53

persuade me that it was possible that that state of things should co-exist with no public way across the little piece of green... I am not laying this down as law; but I cannot understand how there could be a public way up to the gate – practically, I mean; I do not mean theoretically, - but how in a locality like this there could be a public highway up to the gate without there being a highway beyond it. If there were a public highway up Tinker's Lane before 1835, it does not seem to me at all a wrong step to take, or an unreasonable step to take, to say there must have been one across that green."

There are three often-cited cases on *culs-de-sac* and whether such can be (public) highways: *Roberts v. Webster* (1967) 66 LGR 298; *A.G. v. Antrobus* [1905] 2Ch 188; *Bourke v. Davis*, [1890] 44 ChD 110. In each of these the way in dispute was (apparently) a genuine dead-end with no 'lost' continuation. Fundamental argument in each was whether or not a cul-de-sac (especially in the countryside) could be a (public) highway. In each case the court took the point that the law presumes a highway is a through-route unless there are exceptional local circumstances: e.g. a place of public resort, or that the way was expressly laid out under the authority of statute, such as an inclosure award.

The middle part of Tinker's Lane today. Picture: Dave Tilbury
Thanks to Dave Tilbury and Colin Seymour for assistance in this article

So, what has become of the part of Tinker's Lane that crossed the common? That part of the lane not in dispute in 1892, that is to say the section up to the gate, is a sealed carriageway, sunken in part, with grass verges. From the point where the gate stood the tarmac stops and the bounding features of the lane open out, delta like onto the common. The situation and appearance cannot be much different to that in 1892 when the jurors visited the site. There is currently no well-defined route on the ground but the general line could, in dry weather, be driven in a saloon car. The case report states that there were two routes across the common and here, like a much of what we now refer to as the New Forest, there is evidence of man's activities on the landscape in the way of banks and hollows.

Oddly, despite the efforts of the New Forest Highways Board, its successor, Hampshire County Council, has not recorded the lane on either the definitive map or the list of streets. A local resident has written to the highway authority seeking to have the lane recorded on the list of streets. The response from the surveyors' department was somewhat less than enlightened, and suggested that as the lane would make a nice footpath they had passed the matter to rights of way. The local resident, not put off by such waffle, wrote again, and this time the response was more considered:

"... Therefore, in my view, this [court decision] is insufficient to record the whole route as maintainable public highway, and something other than Lord Esher's judgment has to be shown to justify it being so recorded."

That was the position a year ago; nothing has happened since. The matter is being pursued but readers are advised not to hold their breath whilst waiting for the outcome...

In *A.G. (At Relation of A H Hastie) v. Godstone RDC* (1912) JP 188, Parker J was called upon to give a declaration that a cluster of minor roads were public and publicly repairable highways. "The roads in question certainly existed far back into the eighteenth century. They are shown in many old maps. They have for the most part well-defined hedges and ditches on either side, the width between the ditches, as is often the case with old country roads, varying considerably. There is nothing to distinguish any part of these roads respectively from any other part except the state of repair. They are continuous roads throughout and furnish convenient short cuts between main roads to the north and south respectively [note the similarity of logic here with Wills J in *Eyre* - ADK]. It is possible, of course, that a public way may end in a *cul-de-sac*, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not. It was suggested that there might be a public carriageway ending in a public footpath and that Cottage Lane and St Pier's Lane are public carriageways to the points to which they are admittedly highways, and public footpaths for the rest of their length. I cannot find any evidence which points to this solution of the difficulty, and so far, at any rate as evidence of the user of the road is concerned, there is no difference *qua* the nature of that user between those parts of the roads which are admittedly highways and those parts as to which the public right is in issue."

So... The courts seem to have a clear view on *culs-de-sac* and through routes. Take, for example, an inclosure award that awards public carriage road status on a way up to the boundary of the award, with the way continuing on-and-across, with, say, only footpath status, to link with another public carriage road. Unless it can be shown that the public carriage road was a 'genuine *cul-de-sac*', i.e. serving a non-road place of public resort suitable to qualify as a *terminus* in law, there must be a strong, but rebuttable, presumption that the whole of the way is an ancient through-route of public carriageway status. Not only is this common sense, it is a rule that *must* bite on all highway authorities and Inspectors in determining applications and orders.

In a recent decision letter, Inspector Dr T O Pritchard was tasked to consider the true status of a through-route that currently 'changes status' part-way. He said it is "... Improbable for part of a continuous route to be part footpath and part carriageway", expressly taking the *Godstone* case as authority. [FPS/A4710/7/22 723, of 31.3.1999].

On 14 August 1994 an application was submitted to Northumberland County Council to add a BOAT. Part of this route was set out in an inclosure award as "public carriage road", part in another award as "public highway". NCC refused to make the order and was reversed by the Secretary of State on appeal. Northumberland persists in ignoring the directions of the courts in this area - see page 41, this issue.

INQUIRY ISSUES

Maps and walls

About 1500 metres of public path with footpath or bridleway status are upgraded to BOAT on the basis of map evidence and physical features
J E Perrett
FPS/C2300/7/58 & 60
12 May 1999

In 1994 Lancashire County Council, responding to a claim originally submitted in 1987, made two orders to upgrade four footpaths and one bridleway, in the parishes of Haslingden and Rawtenstall, to byway status. Taken together with an unclassified county road (Oakenhall Wood Old Road), which provides a "middle section", these paths constitute a continuous west-east route of around two and a quarter kilometres, bearing the names of Laund Lane (the section to the west of the UCR) and Collinge Fold Lane and Lee Brook Road (the section to the east of it).

The council's case rested entirely on maps, physical evidence, and a booklet published locally some seventy years ago. In his decision letter the Inspector notes that all of the claimed route, except for Lee Brook Road, appeared on a number of old maps dating back to the 1700s. Though the scale on some might be small, the general alignment seemed to be the same. The Ordnance Survey maps were of larger scale and showed this part of the route with the names it carries today. What, then, was its status? It was suggested by objectors that the cottage at the "top" of this part of the route was occupied by a drover, and hence that the route was an old droving road. The Inspector does not agree: "Given the enormous amount of construction necessary to form this route and a number of similar ones in the area, with dry stone walls bounding them from adjacent land, I am satisfied they were meant for public use and not for the personal use of a drover or to give access to private properties along them". Objectors also argued that the route was too narrow, the corners too sharp and the gradients too steep to take wheeled carts; but again the Inspector disagrees. "I consider the route is wide enough for a small farm cart to use", he writes, "and the gradients and corners are not such as would preclude this. I am supported in my view by the booklet written by Councillor Hargreaves and published in 1928 in which he refers to 'the first road from Haslingden into this district' ".

Mr Perrett considers the status of Lee Brook Road (the easternmost section) separately. Early map evidence was inconclusive here, with the bridge carrying this route past the *Craven Heifer* public house not shown with any clarity until the OS Map of 1893. However, the Inspector notes that "the route does appear on the Finance Act Map of 1910 and although the photocopy before me was poor, it clearly showed what was perceived at that time to be a public route. Similarly, the Authentic Map Directory of South Lancashire shows Lee Brook Road and the bridge next to the Craven Heifer. Whilst I accept that these maps are not proof of status, on the balance of probabilities, I am satisfied Lee Brook Road was considered to be a public right of way for vehicles and in the absence of any evidence of a formal stopping up order having been made, I consider this is the case today".

The orders are confirmed.

Modification on request

Having found that a bridleway should be downgraded , an Inspector decides that one section should retain its higher status because this is what the relevant landowner requests
D T Bryant
FPS/C2300/7/83
25 May 1999

An order downgrading a bridleway in the parish of Eccleston to footpath status was made by Lancashire County Council at the direction of the Secretary of State for the Environment. The applicant was the owner of most of the land over which the route ran, and at the ensuing public inquiry the case for the order was made on her behalf, with the county council remaining 'neutral'.

In his characteristically thorough decision letter, Mr Bryant gives his reasons at length for finding that, on the balance of probability, an error was made when the definitive map was drawn up, and that equestrian rights had not subsequently been established either by dedication at common law or by statutory dedication. He reaches these conclusions "with considerable regret"; but "current legislation is unequivocal". However, he is "pleased to respond to a request from the owners of the land crossed by Section E-F [one end of the order route] ... that, whatever my decision, this stretch retains its bridleway status".

He therefore modifies the order to this effect.

Valuable Principles

An Inspector agrees that "it is improbable for part of a continuous route to be part footpath and part carriageway".
Dr Tom Pritchard
FPS/A4710/7/22 & 23
31 March 1999

Last year (*Dunlop rides again*, B&B 1998/6/36) we reported Dr Pritchard's decision to award byway status to two footpaths in the Calderdale parish of Ripponden. Objections led to a second inquiry, at which the case for this upgrading was again presented by Sue Taylor on behalf of the South Pennine Packhorse Trails Trust and other associated organisations. The two footpaths in question form a continuous route known as Heyes Lane, which connects at both ends with public vehicular highways, maintained by the local authority.

At this second inquiry Sue Taylor was able to call the Inspector's attention to the judgement given in *Attorney-General ex rel Hastie v. Godstone Rural District Council* (1912), suggesting that this was highly relevant to the present case. In *Hastie*, she explained, "it was held ... that the following characteristics of an old road should fairly have some weight ... on the side of public vehicular highway; its existence far back into the 18th century; its presence on old maps; well defined hedges and ditches with varying width between; nothing to distinguish different parts from each other except the state of repair; continuous throughout and furnishing convenient short cuts between main roads; improbability that part of a continuous thoroughfare should be a public (vehicular) road and part not". It had thus "been settled by Mr Justice Parker that it is improbable for part of a continuous route to be part footpath and part carriageway". Ms Taylor submitted that "Heyes Lane is such a continuous route and ... the principles enunciated by Justice Parker apply".

In his decision letter the Inspector explains that his earlier decision was made on the basis of various items of historical and documentary evidence, none of them conclusive when regarded separately, but collectively providing a balance of probability in favour of vehicular rights. He continues as follows: "The principles enunciated by Justice Parker in the *Hastie* case are valuable as an approach to the evidence before me. All aspects of the evidence, whether contemporary or historical, should be considered and weighed. I have carried out that process. Part of the process involved giving consideration to an issue that arose in the *Hastie* case which led the Judge to the conclusion that it is improbable for part of a continuous route to be part footway and part carriageway". Heyes Lane was part of such a route, "and that fact, combined with the historical and other evidence available, has convinced me that we are dealing with a byway".

The order is confirmed as modified.

Necessary but not expedient

An Inspector turns down a 'necessary' stopping up order on grounds of 'expediency'.
B W James
FPS/J0215/5/5
23 April 1999

This determination has underlined the fact, although "there is a tendency to assume that once planning permission has been granted, the decision to confirm the necessary public path order is almost a foregone conclusion", nevertheless "this is clearly not the case"

Appendix 15

A.G. (At Relation of A H Hastie) v. Godstone RDC (1912) JP 188

THE JUSTICE OF THE PEACE, MAY 25, 1912

CHANCERY DIVISION.

February 8, 9, 12, 13, 29, 1912.

(Before PARKER, J.)

ATTORNEY- GENERAL. (AT THE RELATION OF A. H. HASTIE) V. GODSTONE RURAL DISTRICT COUNCIL.

Highway - Ancient roads - Evidence of user - Evidence of reputation - Evidence of repair.

This was an action brought by the Attorney - General, at the relation of XA. H. Hastie, against the Godstone Rural District Council for a declaration that three ancient roads in the Parish of Lingfield were respectively public highways and repairable by file defendants. The defendants admitted that portions of two of the roads were highways and that they had been repaired, but as regards the remainder they denied that they were highways.

Held, *on the evidence, that there must be a declaration that there must be a declaration that they were highways repairable by the inhabitants at large.*

This was an action brought by the Attorney - General at the relation of A. H. Hastie, the lessee and occupier of Starborough Castle, in the parish of Minefield against the Godstone Rural District Council for a declaration that certain ancient roads were respectively highways, and that the defendants were liable to repair the same. The action concerned three roads known respectively as St. Pier's Lane, Cottage Lane, and Water Lane. St. Pier's Lane commenced in the main road between Dorman's Land and Lingfield near a farm known as C1arewel1 Farm, and ran north-east past St. Pier's Farm, makings a junction with Cottage Lane at a point some little way south of Eden Brook. Cottage Lane commenced in the main road between Dorman's Land and Marsh Green near a farm called Moor Farm, and running for some distance in a northerly direction turned to the north-west and made a junction with St. Pier's Lane. Water Lane commenced at this junction, and running north crossed the Eden Brook by a ford lying for some little distance up the bed of the brook and ended at a point in the main road from Lingfield to Edenbridge, west of a mill called Haxted Mill. There was a footbridge over the Eden Brook near the ford, and there was some evidence that Water Lane used at one time to be called Longbridge Lane. Similarly certain cottages, which previously stood in the angle made by St. Pier's Lane and Cottage Lane at their point of junction, used to be called Longbridge Cottages.

The roads in question existed far back into the eighteenth century; they were shown in many old maps, and had for the most part well defined hedges and ditches on either side. They were continuous roads throughout, and furnished convenient short cuts between main roads to the north a south respectively.

All further facts appear from the judgment of PARKER, J.

Romer, K.C., and J. W Manning for the plaintiff.—These roads are highways and were highways before the Highways Act, 1835. and are repairable by the inhabitants at large (*R. v. Inhabitants of Leake* (1833), 5 B. & Ad. 469; *R. v. Inhabitants of Lordsmere* (1850), 15 Q. B. 689; *R. v. Inhabitants of Newbold* (1869), 19 L. T. 656). This ease is almost exactly similar to the recent ease decided in this court where considerations affecting the question of the *onus probandi* in highway cases were set forth – *Attorney - General v. Watford Rural District Council* (1911), 76 J. P. 74.

Alexander Macmorran, K.C., and W. W. Mackenzie, for the defendant council. - It is admitted that St. Pier's Lane from its commencement to a point near St. Pier's Farm, and cottage Lane from its commencement to its junction with a private accommodation way leading to Stockhurst Farm, are

public highways so repairable, but it is denied, save to this extent, that any part of the roads in question is a public highway at all. If there is any right of way at all it is merely a footway. The traffic over these roads can be accounted for by the necessities of several farms which exist in the area traversed by these roads. Water Lane is really only the bed of an old stream. The old maps and the tithe maps produced in evidence do not agree. These roads are merely accommodation roads with public rights of footway over them (*Holloway v. Egham Rural District Council* (1908), 72 J. P. 433). They were used by the farms alone and no repairs have been done by the highway authority. Further, the culvert which has been referred to in evidence could not have been lawfully constructed as it was across a highway. The evidence of reputation in this case is inadmissible, because this matter was in controversy when the statements were made by the deceased persons.

Romer, K.C., in reply.

Cur. Adv. Vult.

February 29.

PARKER, J.—This action concerns three roads in the county of Surrey now known respectively as St. Per's Lane, Cottage Lane and Water Lane. St. Pier's Lane commences in the main road between Dorman's Land and Lingfield, near a farm known as Carewell Farm, and running north-east past St. Pier's Farm makes a junction with Cottage Lane at a point some little way south of the Eden Brook. Cottage Lane commences in the main road between Dorman's Land and Marsh Green near a farm called Moor Farm, and running for some distance in a northerly direction turns to the north-west and makes a junction with St. Pier's Lane at the point above mentioned. Water Lane commences at this junction, and running north crosses the Eden Brook by a ford lying for some little distance up the bed of the brook, and ends at a point in the main road from Lingfield to Edenbridge west of a mill called Haxted Mill. There is a footbridge over the Eden brook near the ford, and there is some evidence that Water Lane used at one time to be called Longbridge Lane, probably from this bridge. Similarly certain cottages which previously stood in the angle made by St. Pier's Lane and Cottage Lane at their point of junction, used to be called Longbridge Cottages. The Attorney – General claims a declaration that all these roads are Public highways repairable by the inhabitants at large. The defendants, who are the highway authority for the district in which the roads are situate, admit that St. Pier's Lane from its commencement to a point near St. Pier's Farm and Cottage Lane from its commencement to its junction with a private accommodation way leading to Stockhurst Farm are public highways so repairable. But they deny that, save to this extent, any part of the roads in question is a public highway at all. The roads in question certainly existed far back into the eighteenth century. They are shown in many old maps. They have for the most part well-defined hedges and ditches on either side, the width between the ditches, as is often the ease with old country roads, varying considerably. There is nothing to distinguish any part of these roads respectively from any other part except the state of repair. They are continuous roads throughout and furnish convenient short cuts between main roads to the north and south respectively. It is possible, of course, that a public way may end in a cul-de-sac, but it appears rather improbable that part of a continuous thoroughfare should be a public highway and part not. It was suggested that there might be a public carriageway ending in a public footpath and that Cottage Lane and St. Pier's Lane are public carriageways to the points to which they are at admittedly highways, and public footpaths for the rest of their length. I cannot find any evidence which points to this solution of the difficulty, and so far, at any rate as evidence of the user of the road is concerned, there is no difference *qua* the nature of that user between those parts of the roads which are admittedly highways and those parts as to which the public right is in issue. These considerations might, I think, fairly have some weight with a jury in considering evidence on the question whether the roads in question were or were not throughout public highways. I propose to consider this evidence under the following heads, that is to say, first, the evidence of user; secondly the evidence of repair; and thirdly, the evidence of reputation. With regard to the first head, it was contended that I ought to disregard all evidence of user for the purpose of access to fields or houses adjoining the roads in question because such user might conceivably be explained by the existence of private rights of way. No doubt the possibility of explaining and accounting for acts of user by the existence of private rights must affect the value of the facts proved as evidence of dedication, but in my opinion the proper course is in the first instance to take cognizance of all the facts and then to consider what inference ought properly to be drawn from them. While on the one hand little weight ought to be attached to occasional user by the public of a road systematically used for occupation purposes, it is on the other hand necessary to remember that user for occupation purposes may have arisen precisely because the road was a public road, it being open to every one with a field adjoining a highway to open from the highway a gate into

his field and to use the highway for his own accommodation as owner of that field. No doubt in the present case there has been a considerable user of the roads in question for purposes not necessarily involving through traffic. It appears that some of the meadows adjoining the Eden Brook near the footbridge are divided into " cuts " which belong to the owners of numerous farms, some adjoining the roads in question and some lying to the north or south of the respective main roads with which the roads in question communicate. It does not appear from the evidence what the nature of these cuts precisely is. Apparently each cut involves the right to take hay from a defined portion of the meadow and after the hay is cut to pasture cattle in common with the owners of other cuts on the whole of the meadow. There is plenty of evidence as to the user of all three roads for approaches to the cuts for these purposes as well as for approaches to fields and houses adjoining the roads throughout their whole length. Besides this traffic, which may perhaps be called accommodation traffic, there is, however, considerable evidence of the user of the roads in question for through traffic from or to the main roads with which they communicate on the north and south respectively. There is, for example, the evidence of James Laker 79 years old, who, when a boy, for the fun of driving through the ford used to get into tradesmen's carts going from Dorman's Land to places north of the main road between Minefield and Edenbridge. They used to go this way when the load was light for the sake of the short cut, driving the whole length of St. Pier's Lane and Water Lane respectively, and returning by the same route. Anyone, the witness said, would go that way if they could. But people could not always get through the water. Again, Francis Owall, who is 81 years old, and has lived most of his life at Marsh Green, used often to drive the whole length of Cottage Lane and Water Lane in order to fetch flour from Haxted Mill. He, too, speaks to a similar user of St. Pier's Lane and Water Lane by butchers taking meat from Dorman's Land to places north of the road from Lingfield to Edenbridge. Then there is the evidence of Barnabas Eddings, John Chapman, Albert Edward Poynter and George Eddings to somewhat the same effect, though in the ease of some of these witnesses it is less clear that they are referring to through as opposed to accommodation traffic. William Greenaway, one of the defendants' witnesses, used, however, to cart goods from Haxted Mill down Water Lane and Cottage Lane to several places on the main road between Dorman's Land and Marsh Green. There is evidence that some at any rate of the persons who used the roads did so in the belief that they were public roads, but I can find no evidence that any person used any part of the roads in the assertion of a private as opposed to a public right of way. My conclusion is that the proved user of the roads points to a public right rather than to private easements. I will now pass to the evidence as to how the roads in question have been repaired. Mr. Stallard, the Oxfordshire county surveyor, made two sections in Water Lane at points taken haphazard, one towards its northern end and one a little distance above the ford over the Eden Brook. The first section showed that the road at that point is for some fourteen feet a metalled road with fourteen inches of gravel and flint obviously brought there for metalling purposes. The second section which was near the brook did not disclose any traces of metalling. There was gravel beneath the silt, but this appeared to be the natural formation. Mr. Stallard also made a section on Cottage Lane at a point where it is not admitted to be a highway. He found a metalled road surface obviously constructed with some skill extending for a width of 7 feet 9 inches and thicker under the wheel tracks than elsewhere. It was made of stone, which Mr. Powell identified as probably from the Limpsfield Common Quarry. Lastly, Mr. Stallard made two sections of St. Pier's Lane at points where it is not admitted to be a highway. In both sections under the surface silt he found a properly shaped metal road made with some skill to a width in one section of 10 feet 6 inches and in the other of 9 feet, the metalling consisting of stone which Mr. Powell identified as from the Mutton Hill Quarries. Both the quarries I have mentioned are in the neighbourhood. This evidence proves that the three roads in question have even in parts where the public right is denied been made up or repaired with material brought from elsewhere for the purpose. If this repair was done by the highway authority for the time being, one would expect to find entries connected with the work in the records of such authority if such records have been preserved. As a matter of fact some of the account books of the surveyor of highways for the parish of Lingfield, in which all these roads are situate, have been preserved, and in these account books are found entries of payments on account of work done on all three roads. So far, however, as St. Pier's Lane and Cottage Lane are concerned it is difficult to say whether the entries relate to those parts of these lanes where the public right is denied as well as to those parts where it is admitted. I will mention a few of the entries relating to each lane. I ought, however, to say that I take the entries relating to work done at Longbridge or Longbridge Lane as referring to work done in Water Lane, though possibly at a point south of the Eden Brook. I think this is the correct inference, for the account books distinguish between Cottage Lane and St. Pier's Lane on the one hand and Longbridge or Longbridge Lane on the other. First, then, as to Water Lane. Under date July 9th, 1836, we find Thomas Bran paid for two days' work at Longbridge, and he is similarly paid for one day's work at Longbridge on October 8th the same year, and on January 5th, 1837. On March 15th 1837, and again on August 1st, 1837, Mr. Skinner is paid for

carting stones from Tilbuster Hill to "Longbridge or Longbridge Lane." In April, 1837, Thomas Bran is paid for twelve days' work at Longbridge, three of them for road scraping. In January 1838, he is paid for breaking gravel at Longbridge, and in February of the same year for laying on gravel at Longbridge. In December, 1855, three men are paid for repairing the road at Longbridge. In May, 1860, Abraham Betts is paid for five days' work for packing in, etc., that is, in all probability packing in the ruts at Longbridge. In June, 1861, William Agent, William Stone and Thomas Humphreys are paid for several days' work in repairing the road at Longbridge, and about the same time there is an entry of a payment to Joseph Stamford for team work at Water Lane leading to Longbridge. In 1863 there is an entry relating to levelling down in Water Lane. Next, with regard to St. Pier's Lane, omitting entries for work done at St. Pier's Green or Sampier's Green, where the lane is admittedly a highway, we find in 1837 numerous entries of payments for laying gravel, scraping, or letting out water in St Pier's Lane or Sampiers, and there are entries in 1837 and 1838 of payments for team work in connection with carting gravel to this lane. There is a like entry in 1854, and in June of that year George Titchener is paid for ten days' team work in carting gravel to all parts of St. Pier's Lane. In 1857 and 1858 there are several entries of payment for work in repairing St. Pier's Lane. In 1859, 1860, 1861 and 1863 there are similar entries either for repairing or laying gravel or levelling in this lane. Lastly, with regard to Cottage Lane, there are a considerable number of similar entries, but as in the ease of St. Pier's Lane so in the ease of this lane, it cannot be said with any certainty whether the entries relate to work done on that part of the lane where the public right is in issue. The entries in the surveyor's account books cease in 1864, for in that year the public highways in Lingfield came under the control of the Godstone Highway District board, and the account books of this board are not forthcoming. There is, however, some oral evidence with regard to repairs done in Cottage Lane, where the public right is in issue. Mr. Powell, who was from July 1st, 1896, to Christmas, 1908, surveyor to the Godstone Rural District Council, who as highway authority succeeded the Godstone Highway District Board, on one occasion at least did repairs in Cottage Lane near the point where it bends to the north-west. The road had become dangerous, and he ordered a specially large gauge of stone to fill in the holes made by floods. Again, Mr. Poynter, of Stockhurst Farm, remembers one occasion upon which the whole of Cottage Lane was repaired, and the steam-roller rolled in the ruts right down to the junction with St. Pier's Lane. This was, he thinks, eight or nine years ago. Before leaving the question of repairs I ought to add this. There was some evidence that Joseph Stanford, who had land adjoining Water Lane, or men in his employ, used from time to time to repair the roadway for his or their own convenience, and this was relied on as showing that the lane was not a public highway but an occupation road I only. The value of this evidence is, however, diminished by the fact that this same Joseph Stanford appears from the surveyor's account books to have been paid, at any rate on one occasion, by the highway surveyor, for carting stone to the lane, and also by the fact that two of the men in his employ, who are said to have done work of repair in the lane, appear from the same account books to have been paid by the surveyor for work in the lane. It is not impossible, therefore, that the work said to have been done by Joseph Stanford or his men was in reality paid for by the road authority. Even, however, if this were not so, I do not think that the evidence of what Joseph Stanford did in the way of repairs destroys the value of the evidence contained in the surveyor's account books. I will now turn to the evidence of reputation. There is an entry in the Lingfield highway rate book, dated March 1st, 1859, and entitled "A memorandum of the measurements of the highways in the parish of Lingfield measured by Mr. Batchelor's cart the wheel of which measured 15 feet 2W inches in circumference by Mr. Batchelor and Benjamin Groves." It is proved that Mr. Batchelor was the parish surveyor and Benjamin Groves the parish clerk at the date of the entry. It is also proved that the entry was in the handwriting of Benjamin Groves. Both he and Mr. Batchelor are dead, but Mr. Groves' son was called as a witness. He remembers seeing his father and Mr. Batchelor start on the expedition of which the memorandum purports to be a record. The highways to which the record relates include the three lanes in question and though its contents may not be evidence of any particular fact stated therein, I think the record itself is admissible as showing that in March, 1859, the three lanes in question were all of them reputed to be public highways. Again, John Chapman, aged sixty-nine, remembers his mother, who used to go about in a caravan selling baskets, complaining to him about thirty-five years ago that Water Lane, which she called the old parish road, was out of repair. But perhaps the strongest evidence of reputation, at any rate as to Water Lane, is obtained from the minute book of the Godstone Highway District Board, which was formed in 1864. On June 24th, 1864 that board passed a resolution in reference to a proposed diversion of Water Lane, and on July 22nd, 1864, appointed a committee to inspect the lane with that object, and directed their clerk to write to the landowners to inquire whether they would give the land required for the diversion. On August 30th, 1864, the question of the proposed new road at Water Lane was again considered and estimates directed to be prepared. On October 28th, 1864, the board considered estimates relating to the propose road in substitution for a

certain road in Lingfield parish, called Water Lane, in conformity with s.47 of the highways Act, 1864, and the clerk was directed to consult with Lingfield Vestry. The reference to s. 47 of the Act of 1864 makes it quite clear that the board were proceeding on this footing that Water Lane was a highway. The clerk did consult the Lingfield Vestry and the vestry passed a resolution that did not consider the making of the proposed new road necessary for the convenience of the public. This resolution is in my opinion only explicable on the same footing. November 25th, 1864, the highway board determined to postpone further consideration of the matter for six months, and the proposal does not appear to have been revived again. There can be no doubt, however, that throughout the whole of these transactions everyone concerned took it for granted that Water Lane was a highway. On November 2nd, 1869, the vestry passed a resolution that the board be asked to repair the culvert at or near Longbridge, There appear to be only two culverts to which this resolution can refer. The first is a culvert by which the surface water of St. Pier's Lane and Cottage Lane is taken into the Eden Brook. The second is a culvert north of the Eden Brook by which Water Lane is carried over a small natural watercourse. The resolution may relate to either culvert, but both are in Water Lane. On December 3rd, 1869, the board directed their surveyor to attend to the matter. On January 19th 1877, Mr. Stanford, the waywarden for Lingfield and therefore a member of the board, complained to the board of the condition of Water Lane, saying it was almost impassable, and the board directed its surveyor to attend thereto as soon as possible. On July 26th, 1882, a Mr. Hamlin, a member of the board, reported as to inquiries he had made on the subject of Water Lane being a highway and recommended that no more gravel should be taken there. The discussion of the matter was postponed. This is the first Suggestion I can find that Water Lane was not a highway. I cannot find that the matter was again discussed, but it is not improbable from the evidence that the board did cease carting gravel to Water Lane. At any rate, it must now be very many years since the road authority or anyone else has done anything in the way of repairing Water Lane, and such lane has long been almost, if not quite, impassable. With regard to St. Pier's Lane there appears to be only one entry relating to it. On October 8th, 1869, there is a minute to the effect that Mr. Barnford, of Starborough Castle, attended and complained of its condition, saying it was a public highway repairable by the inhabitants at large, having been gravelled up to St Pier's Farm and near Longbridge at the public expense. The board resolved that there was no sufficient evidence that St Pier's Lane was a public highway repairable by the inhabitants at large. It should be noticed that the Lingfield waywarden was not present at this meeting of the board. Further, the resolution does not appear to draw any distinction between the various parts of the lane. It is quite clear, however, that the board or their successors must subsequently have admitted that at any rate from its commencement to St. Piers Farm Mr. Barnford's contention was correct. There appears to be no entry in the minute books of the board with regard to Cottage Lane, nor is there any further material entry in the minutes of the board or their successors until we come to the complaints and correspondence which led up to the institution of this action. I will now consider the evidence relied on by the defendants as tending to show that Water Lane and those parts of St. Pier's Lane and Cottage Lane where the public right is in issue were never public highways. The evidence adduced by the defendants mainly concerned Water Lane, probably because if Water Lane is not a highway the probability of St. Pier's Lane and Cottage Lane being public thoroughfares is greatly diminished. It is improbable that anyone should leave the main roads on the south merely for the sake of getting back into them by a long circuitous route through the two lanes. The evidence adduced by the defendants shows clearly that Water Lane is now in such a state of disrepair, and is in places so overgrown with alders and rushes, that no one would be likely to infer from its appearance that it was a public highway. Further, it is for a great part of the year so waterlogged as to be quite impassable either n foot or in carts or carriages. It must be remembered, however, that nothing in the way of repairing it has been done for many years, and I cannot properly from its present condition infer what its condition vats in the days when the vestry of Lingfield and their surveyor had the care of the parish roads. Certainly no one could ever use it without fording the Eden Brook, and as the road descended into the Eden Brook from the south and came up out of the Eden Brook towards the north, the road would necessarily be waterlogged for a distance on either side of the brook varying with the height of the water in the brook itself. In times of heavy water, and such times are frequent during the winter months, the road could never have been used because of the depth of water at the ford and the length of road which would necessarily be submerged. The present waterlogged condition of the road is not, however, in my opinion accounted for by the Eden Brook. It depends largely on the surface water coming from lands lying north of the main road from Lingfield to Edenbridge. This water is led under the main road by a culvert which empties itself into one of the ditches, or what used to be one of the ditches, of Water Lane. The ditches of Water Lane have, however, from want of proper cleaning long since silted up, and the water from the north now passes down the road itself, and has so washed away the road that it has the appearance of a water course. Further, there is a point between the main road and the ford where Water Lane is carried over a small

natural water course by means of the culvert I have mentioned The ditches of Water Lane would naturally drain into this water course and the water from the north would thus find an outlet from the lane. There are, however, certain works constructed in connection with the culvert and designed for the purpose of irrigating the adjoining meadows, and these works, at any rate in their present condition, tend to dam up the water coming from the north in the lane itself, which is for the most part somewhat below the level of the adjoining lands, and thus the lane constantly tends to become waterlogged. There is no satisfactory evidence when the works in connection with the culvert were constructed, or whether if the ditches of Water Lane were re-opened they could not be made to drain into this watercourse. But even the defendants' witnesses admitted that it would not be difficult to prevent the lane being injured by water from the north if those ditches were re-opened. In my opinion the right inference is that in the old days before 1864, when the highway board was constituted, the lane was not waterlogged north of the culvert to anything like the extent to which it is now. The fall between the main road and the culvert is quite sufficient to admit of the lane being properly drained and avoiding all difficulty from water except in times of flood. Apart from the evidence above mentioned as to Water Lane, the defendants adduced negative evidence to show, first, that Water Lane had never been repaired except by Joseph Stanford; secondly, that Cottage Lane and St. Pier's Lane, where the public right is in issue, had never been repaired at all; and, thirdly, that the only traffic in Water Lane, and those parts of the other two lanes in which the public right is in issue, was in the nature of accommodation traffic and not through traffic. In referring to the plaintiff's evidence I have already sufficiently indicated the view I take on these points. Having considered as carefully as I can the evidence before me, I have come to the conclusion that the facts proved can only be explained on the hypothesis that all three roads are throughout their whole length public highways repairable by the inhabitants at large. There can, I think, be no doubt that this was the view of the Lingfield Vestry when that vestry had the control of the highways in their parish, and accordingly they repaired these roads as far back as 1836. In default of evidence of dedication since the Highway Act, 1835, I think the proper inference is that the roads were dedicated before the passing of that Act. When the highway board was constituted such board acted on the footing that Water Lane, at any rate, was a highway repairable by the inhabitants at large. The scheme for the diversion of this road having fallen through, the board, however, began to neglect its repair, and finally ceased to repair it altogether, with the result that it soon fell into such a condition as to be practically impassable. It ceased to be used for through traffic, though it continued at times to be used for accommodation traffic, and possibly Mr. Stanford or others may for their own convenience have done temporary repairs. When through traffic ceased in Water Lane it would naturally cease also on the two other lanes, and the user of such lanes also would be confined to accommodation traffic The extent to which they were repaired would naturally be regulated by their user, and this in my opinion has led to the one being repaired only to St. Pier's Farm and the other to Stockhurst Farm only. I propose, therefore to declare that the three lanes are public highways for all purposes repairable by the inhabitants at large, and the costs of the action must follow the event.

Judgment for plaintiff.

Solicitors for the plaintiff: Hasties.
Solicitors for the defendants: Turner and Evans, for E. A. Head, East Grinstead.